Partnership investment, (c) any investor who wished to get out of his Partnership investment could opt out and he would be repaid his original investment sum plus accrued interest, *(d) the lapsed Partnership interests resulting from investor cash* outs were proportionately offered to investors electing to stay in so they could increase their percentage of ownership of Concepts stock and (e) additional Concepts stock was offered to raise working capital (*R:279*). Muegler, as Concepts attorney, prepared the legal portion of a Prospectus (*R:278-279*). Certified public accountants Messrs. Mueller, Prost, Purk & Willbrand compiled the financial statements contained in the Prospectus (*R:278*; *Exhibit 2*, *R:288*; *Exhibit 18*, ppg. 228-266, *R:527*).

Creditors elected to "stay-in" and get Concepts stock. All of Creditor's Concepts stock investments, totaling $44,600.00 in the aggregate, were made pursuant to the terms of the Concepts Prospectus (*R:279-280*; *Exhibit 3 R:330*; *Exhibit 4 R:333*; *Exhibit 16*, ppg. 88 thru 114 *R: 409*; *Exhibit 17*, ppg. 312-314 *R:493*; *Exhibit 18*, ppg. 228-266 *R:527*; *Exhibit 19*, ppg. 381-406 *R:583*).

Harre's $21,750.00 Concepts common stock investments were evidenced by three stock purchases from Concepts Communication Management Corp. under Prospectus, to wit : (a) a Harre check for $6,250.00 [Plaintiff's Exhibit 1-1] for 1 "B" share, (b) a Harre check for $12,500.00 [Plaintiff's Exhibit 1-2] for 4 "A" shares and (c) a Harre check for $3,000.00 [Plaintiff's Exhibit 1-3] for 3 "C" shares (*R:279*: *Exhibit 3 R:330*). The purchase price Harre paid was the same price paid by all other purchasers of Concepts stock on the date of each purchase by Harre (*R:279-280*). All three Harre checks were made payable to Concepts (*R:279-280*). Concepts negotiated and collected each of these checks for its' own account and purposes (*R:279-280*). Muegler did not obtain or receive any portion of, or any benefit from, the funds Concepts collected. Prior Case *Exhibits 1-1*, *1-2* and *1-3* (*R:279-280*).

Bening's $22,850.00 Concepts common stock investments were evidenced by six stock purchases from Concepts

Communication Management Corp. under Prospectus, to wit: (a) a Bening check for $6,250.00 [Plaintiff's Exhibit 2-1] for 1 "B" share, (b) a Bening check for $9,475.00 [Plaintiff's Exhibit 2-2] for 3 "A" shares, (c) a Bening check for $3,125.00 [Plaintiff's Exhibit 2-3] for 1 "A" share, (d) a Bening check for $2,000.00 [Plaintiff's Exhibit 2-4] for 2 "C" shares, (e) a Bening check for $1,000.00 [Plaintiff's Exhibit 2-5] for 1 "C" share and (f) a Bening check for $1,000.00 [Plaintiff's Exhibit 2-6] for 1 "C" share (*R:280*; *Exhibit 4 R:333*). The purchase price Creditor Bening paid was the same price paid by all other purchasers of Concepts stock on the date of each purchase by Bening (*R:280*). All six Bening checks were made payable to Concepts (*R:280*). Concepts negotiated and collected each of these checks for its' own account and purposes (*R:280*). Muegler did not obtain or receive any portion of, or any benefit from, the funds Concepts collected. Prior Case *Exhibits 2-1, 2-2, 2-3, 2-4, 2-5* and *2-6* (*R:280*).

On March 11, 1989, Creditors went to Concepts offices to buy a limited partnership interest in Concept's proposed expansion into the Springfield, Illinois area (*R:280-281*). Muegler appeared as Concepts legal counsel (*R:280-281*). James Grice, Concepts' president, was also present. Muegler advised Creditors he was representing the interest of Concepts, not them, in this proposed transaction and that they could leave and take the proposed Springfield joint venture contract documents with them to obtain legal advice from counsel of their choice before continuing discussions (*R:280-281*). Nonetheless, Creditors said they wished to proceed without the assistance of counsel (*R:280-281*). Creditors read and stated they each understood the terms of the joint venture contract documents ("Springfield Joint Venture") (R:280-281). Creditors then signed the documents and each delivered a $60,000.00 contribution check payable to Concepts for their respective limited partnership interest in the proposed venture (*R:280-281; Exhibit 8 R:371*; *Exhibit 9 R:373*). The other proposed limited partner, James Grice, never signed the joint venture documents or contributed his $30,000.00

investment sum (*R:280-281*; *Exhibits 5, 6* and *7 R:338-370*). Concepts was to be the sole general partner (*R:280-281*). Grice did not supply Muegler with the identity of an Illinois registered agent or Illinois registered office needed to complete organization of the Illinois joint venture limited partnership entity (*R:280-281*). The Illinois joint venture limited partnership was never formed (*R:280-281*; *Exhibit 16*, ppgs. 27-32 *R:409*; *Exhibit 17*, ppgs. 48-51, 88-98, 115-123 *R:493*; *Exhibit 18*, ppgs. 284-299 *R:527*);

Muegler did not obtain or receive any portion of, or any direct or indirect benefit from, the funds Concepts collected by negotiation of either Bening's $60,000.00 payment to Concepts or Harre's $60,000.00 check to Concepts (*R:281-284*). *See* United States District Judge James A. Teiborg's finding in the July 26, 2001 Order at Appendix D, page 49a.

Bening's $60,000.00 and Harre's $60,000.00 Springfield Joint Venture investment payment was used by Concepts Communication Concepts Communication Management Corp. to purchase a jumbo $120,000.00 certificate of deposit ("CD") from Citizens Bank, St. Louis, Missouri, circa March 17, 1989 (*R:282-283*; *Exhibits 10, 11, 12 & 13 R:375-382*; *Exhibit 15*, ppgs. 25-37, 40-41 *R:389*).

Concepts Communication Management Corp. then pledged the $120,000.00 CD as collateral for a working capital loan circa March 22, 1979 from Citizens Bank (*R:282*; *Exhibits 11, 12 & 13 R:377-382*; *Exhibit 15*, ppgs. 25-37, 40-41 *R:389*).

Cass Bank, St. Louis, Missouri, paid off the Citizens Bank $120,000.00 loan to Concepts Communication Management Corp. circa January, 1990 in return for an assignment of the $120,000.00 CD to Cass Bank (*Exhibit 20*, ppgs. 481-482 *R:606*).

At no time did Muegler have signature authority to draw funds from Concepts Communication Management Corp.'s Citizen Bank accounts (*Exhibit 15*, p. 337, 475 *R:389*).

Muegler was not (directly or indirectly) a shareholder, officer, director or employee of Concepts at any time (*R:283*) . . . and, Muegler never, directly or indirectly, had a financial or other personal interest in Concepts' earnings, profits, losses, receipts, expenditures, joint ventures, cash flow or business (*R:283*).

At all time Muegler's relationship with Concepts was strictly that of attorney-client and not otherwise (*R:283*).

Muegler never (directly or indirectly) was the attorney, agent, employee, trustee or fiduciary of either Bening or Harre at anytime (*R:283*).

Muegler received attorney's fee and cost reimbursement payments totaling $21,937.50 from Concepts for legal services rendered by Muegler . . . $3,937.50 on August 25, 1988, $5,000.00 on September 8, 1988 and $3,000.00 January 19, 1989 (*R:284*). These Concepts checks were received in Prior Case as Plaintiff's Exhibit 57 (group) (*R:284*). All of these fee receipts occurred *before* the date (March 11, 1989) Creditors contributed $120,000.00 to Concepts (*See Exhibit 8 R:371* and *Exhibit 9 R:373*).

On or about December 29, 1989 law enforcement officials raided Concepts offices pursuant to a Missouri search warrant . . . although the raid produced no evidence of criminal conduct on the part of anyone at Concepts, this raid effectively shut Concepts business down permanently (*R:284-285*). Thereupon, a Concepts' creditor (Gary Fears) foreclosed upon and took possession of Concepts' business and assets (*R:284-285*). Muegler, Bening and Harre met with Gary Fears the first week of January, 1990 at Concepts' former offices (*R:284-285*). At this meeting Muegler informed Fears of Concepts' Springfield Joint Venture contract with Creditors, and, Muegler opined the contract was binding upon Fears . . . and, should be honored by Fears and the take-over creditors (*R:284-285*). Fears refused to honor the Springfield Joint Venture contract (*R:284-285*). In Prior Case, Creditors each testified it was their opinion that Muegler was trying "to take care of Concepts Communication

people", including Bening and Harre at this Fears meeting (*R:284-285; Exhibit 16*, ppgs. 166-171, 262-264 *R:409*).

Ultimately, in April 1990, after unsuccessfully trying to get their investment monies back from Concepts, Grice and Fears, Creditors brought suit against Muegler claiming Muegler was responsible for Concepts representations in Concepts' Prospectus and in the Springfield Joint Venture documents ... as well as for Muegler's alleged statements at Concepts board meetings.

The first time the case went to trial the jury returned a defendant's verdict in favor of Muegler. The case was reversed on instructional err on appeal and remanded for trial. *Bening v. Muegler*, 67 F.3d 691 (8th Cir. 1995).

At the conclusion of the second trial, during which Muegler was not allowed to offer evidence of any kind (*R:634-639*), the jury returned verdicts in favor of *each* Creditor and against Muegler for $130,000 actual damages plus $130,000 punitive damages (*R:63-64*). These judgments, totaling $520,000, are now final ("Prior Case"). *Harre v. Muegler*, 113 F.3d 909 (8th Cir. 1997).

On May 13, 1999, Muegler filed a Chapter 7 voluntary bankruptcy petition in The Bankruptcy Court For The District of Arizona, Phoenix Division.

With leave of court, on September 24, 1999, Creditors filed a *Complaint For Determination That Debt Is Non-Dischargeable* (*R:1*).

On August 2, 2000, the bankruptcy court granted summary judgment (Appendix E) to Creditors by finding Muegler's prior judgment debt to Creditors was non-dischargeable in bankruptcy under 11 U.S.C. § 523(a)(2)A) and 11 U.S.C. § 523(a)(6). Creditor's based their summary judgment motion upon the Prior Case jury instructions and judgment.

Muegler filed a timely Notice of Appeal on August 4, 2000 (*App:257*) to The United States District Court For The District of Arizona (Phoenix Division). District court appellate

jurisdiction was invoked under 28 U.S.C. § 158(a), 28 U.S.C. § 158(c)(1) and Bankruptcy Rule 8001(e).

On July 26, 2001, the district court reversed the August 2, 2000 judgment and remanded (Appendix D) the case to the bankruptcy court on the ground the bankruptcy court erred in applying the doctrine of collateral estoppel to prevent Muegler from litigating the "actual fraud" and "willful and malicious injury" 11 U.S.C. § 523(a) non-discharge issues.

- On March 26, 2002, the bankruptcy court again granted creditors summary judgment (*R:1155,255*) (Appendix C) after finding Muegler's prior judgment debt to creditors was not dischargeable in bankruptcy under the 11 U.S.C. 523(a)(2)(A) "fraud" and the 11 U.S.C. § 523(a)(6) "willful and malicious injury" exceptions to debt discharge, and, that Muegler was collaterally estopped from contending otherwise.

On April 2, 2002, Muegler filed a timely Notice of Appeal (*R:1157*) to The United States District Court For The District of Arizona (Phoenix Division). District court appellate jurisdiction was invoked under 28 U.S.C. § 158(a), 28 U.S.C. § 158(c)(1) and Bankruptcy Rule 8001(e). On January 29, 2003, the district court affirmed the bankruptcy court's summary judgment (Appendix B).

On February 4, 2003, Muegler filed a timely Notice of Appeal (*R:1174*) to The United States Court Of Appeals For The Ninth Circuit. Ninth Circuit jurisdiction was invoked under 28 U.S.C. § 1291.

On appeal to the Ninth Circuit, Muegler contended [a] the "actual fraud exception" at 11 U.S.C. § 523(a)(2)(A) was not applicable because Muegler did not receive either a direct or indirect "benefit" from the alleged fraud as required by the "obtained by" language of 11 U.S.C. § 523(a)(2)(A) and [b] the Prior Case jury instructions did not unambiguously find Muegler committed either "actual fraud" within the meaning of 11 U.S.C. § 523(a)(2)(A) or "willful and malicious injury" as used in 11 U.S.C. § 523(a)(6), and, accordingly it was prejudicial err to apply collateral estoppel due to the lack of identical issues in

the prior case in juxtaposition with the case *sub judice*. Opening Brief of Appellant, United States Court of Appeals For The Ninth Circuit, Appeal No. 03-15259.

On June 24, 2005, the Ninth Circuit affirmed (Appendix A) the district court's and bankruptcy court's judgment. *Muegler v. Bening*, 413 F.3d 980 (9th Cir. 2005). The Ninth Circuit opinion held (a) Muegler waived the jury instruction issue and (b) no "benefit" finding is required under 11 U.S.C. § 523(a)(2)(A). *See* Appendix A. These findings are the source of the issues presented in this Petition For Writ of Certiorari.

On July 11, 2005, the Ninth Circuit granted leave of court to file Muegler's Petition For Rehearing En Banc. On July 11, 2005, Muegler timely filed a Petition For Rehearing En Banc. Rehearing en banc and rehearing by the panel of judges who decided the case were denied August 19, 2005 (Appendix F). This Petition For Writ Of Certiorari was timely filed within ninety (90) days after denial of rehearing August 19, 2005.

REASONS AND ARGUMENT FOR GRANTING THE PETITION

I.

Reasons For Granting The Petition

This Petition for Writ of Certiorari should be granted because:

1. The question of whether a debtor must receive a direct or indirect "benefit" from the fraud to qualify under the Bankruptcy Code "actual fraud" debt non-discharge exception at 11 U.S.C. § 523(a)(2)(A), has not been, but should be, settled by The Court. The closest The Court has come to this issue is found in a footnote in *Grogan v. Garner*, 498 U.S. 279, n.2 (1991), general observations in *Archer v. Warner*, 538 U.S. 314,321 (2003) and in dicta in *Cohen v. De La Cruz*, 523 U.S. 213 (1998). In *Grogan v. Garner*, *supra*, The Court observed: "Arguably, fraud judgments in cases in which the defendant did not obtain money, property, or services from the plaintiffs

and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6)". In *Archer v. Warner*, *supra*, The Court said:

> Congress also intended to allow the relevant determination [whether a debt arises out of fraud] to take place in bankruptcy court, not to force it to occur earlier in state court at a time when nondischargeability concerns "are not directly in issue and neither party has a full incentive to litigate them".

And, in *Cohen v. De La Cruz*, *supra*, The Court stated: [a] "The most straight forward reading of § 523(a)(2)(A) is that it prevents discharge of 'any debt' respecting 'money, property, or . . . credit that the debtor has fraudulently obtained, including treble damages assessed on account of the fraud" [*Id.* at 218] and [b] "When construed in the context of the statute as a whole, then, § 523(a)(2)(A) is best read to prohibit the discharge of any liability arising from debtor's fraudulent acquisition of money, property, etc. . . ." [*Id.* at 220-221]. Muegler contended below the "obtained by" language of 11 U.S.C. § 523(a)(2)(A), in juxtaposition with The Court's statements in *Grogan v. Garner*, *Archer v. Warner* and *Cohen v. De La Cruz*, requires that some "benefit" from the fraud must accrue to the debtor before § 523(a)(2)(A) is applicable. By holding no direct or indirect "benefit" is required for application of 11 U.S.C. § 523(a)(2)(A), the Ninth Circuit Opinion (Appendix A) [a] improperly renders the "obtained by" 11 U.S.C. § 523(a)(2)(A) language meaningless surplusage and [b] is in direct conflict with The Court's statements in *Grogan v. Garner*, *Archer v. Warner* and *Cohen v. De La Cruz*. This "benefit" issue is recurring in 11 U.S.C. § 523(a)(2)(A) bankruptcy cases and is of significant importance to the Bench, Bar and Public. The Ninth Circuit Opinion (Appendix A) is also in conflict with its' own prior decisions as well as other federal appellate court circuits on the same "benefit" issue, to wit: *In re Bilzerian*, 100 F.3d 886 (11th Cir. 1996); *BancBoston Mortgage Corp. v.*

Ledford (In re Ledford), 970 F.2d 1556 (6th Cir. 1992); *Luce v. First Equipment Leasing Corp.*, 960 F.2d 1277 (5th Cir. 1992); *In re Pleasants*, 219 F.3d 372 (4th Cir. 2000); *In re Ashley*, 903 F.2d 599 (9th Cir. 1990); and *In re Arm*, 87 F.3d 1046 (9th Cir. 1996).

2. Under F.R.Civ.P. Rule 56 and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), Creditors, as movants bearing the burden of prove on the 11 U.S.C. § 523(a) "actual fraud" and "willful and malicious injury" non-discharge issues, had the initial burden to *prima facie* show no genuine issues of material fact existed and that movant Creditors were entitled to summary judgment as a matter of law. Here, Creditors relied upon Prior Case jury instructions and Prior Case judgment to meet their burden. Muegler contended below Creditors failed to meet their burden because Prior Case jury instructions did not require the jury to find either "actual fraud" or "willful or malicious injury" within the scope of the Bankruptcy Code in order to return a verdict for Creditors in Prior Case. The Ninth Circuit Opinion refused to rule on this instruction issue on the ground Muegler waived the issue. The Ninth Circuit waiver finding is in direct conflict with F.R.Civ.P. Rule 56, *Anderson v. Liberty Lobby, Inc.*, supra, and the decisions of all other federal circuit court of appeals decisions because Muegler could not "waive", as a matter of law under F.R.Civ.P. 56(e), Creditors predicate initial burden to demonstrate no genuine issues of material fact existed and that movant Creditors were entitled to summary judgment as a matter of law.

3. For the reasons and on the grounds stated in *Reasons for Granting Writ of Certiorari* 1 and 2, *supra*, Ninth Circuit Opinion (Appendix A) so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the bankruptcy court and the district court in this case, as to call for an exercise of this Court's supervisory power.

II.

Argument

A.

A Direct or Indirect Benefit From The Fraud Must Be Obtained By Debtor

At the onset, the 11 U.S.C. § 523(a)(2)(A) "fraud" debt non-discharge provision is governed by the legal maxim "courts should narrowly construe exceptions to discharge against the creditor and in favor of the debtor". *Gleason v. Thaw*, 236 U.S. 558 (1915).

And, also, The Court's admonition in *Archer v. Warner*, 538 U.S. 314,321 (2003):

> Congress also intended to allow the relevant determination [whether a debt arises out of fraud] to take place in bankruptcy court, not to force it to occur earlier in state court at a time when nondischargeability concerns "are not directly in issue and neither party has a full incentive to litigate them".

The plain meaning of 11 U.S.C. § 523(a)(2)(A) language limits the scope of the exception to "not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . actual fraud". The "obtained by" language, if given any meaning and consideration, necessarily requires that the debtor "obtain" [i.e. receive] either "money, property, services, or an extension, renewal, or refinancing of credit" from the "actual fraud" conduct . . . in other words, a "benefit" from the fraud.

In re Bilzerian, 100 F.3d 886 (11th Cir. 1996) provides a detailed analysis of the three views expressed by various decisions up to December 3, 1996 involving interpretation of the § 523(a)(2)(A) "obtained by" language. The first view ("First View"), the narrowest, requires the debtor to actually receive the fruits of the fraud to be within the "fraud" non-discharge exception. The second view ("Second View"),

commonly referred to as the "Receipt of Benefits Theory", requires the debtor gain a direct or indirect "benefit" from the "money, property, services, or an extension, renewal, or refinancing of credit" "obtained by" the fraudulent conduct to be within the § 523(a)(2)(A) "fraud" non-discharge exception. And, the third view ("Third View"), which is the broadest, requires simply that a debtor obtain money by fraudulent means such that a debtor does not have to necessarily receive money personally or receive any benefit at all.

Typically, in prior "fraud" debt non-discharge cases a debtor would argue the § 523(a)(2)(A) "obtained by" language limited the debt non-dischargeability scope to *only* that "money, property, services, or an extension, renewal, or refinancing of credit" actually received by the debtor in the fraudulent transaction. This is the *Bilzerian* First View.

No United States Supreme Court or federal court of appeals circuit to date has adopted the *Bilzerian* First View.

Except for the Ninth Circuit Opinion (Appendix A) in the case *sub judice*, No United States Supreme Court or federal court of appeals circuit decision to date has adopted the *Bilzerian* Third View.

Bilzerian stated "The bankruptcy courts diverge on the question; however, the three circuits that have considered the issue have rendered decisions favoring the 'receipt of benefits' theory" citing *Ashley v. Church (In re Ashley)*, 903 F.2d 599 (9th Cir. 1990), *BancBoston Mortgage Corp. v. Ledford (In re Ledford)*, 970 F.2d 1556 (6th Cir. 1992) and *Luce v. First Equipment Leasing Corp. (In re Luce)*, 960 F.2d 1277 (5th Cir. 1992). *See, also*, *Matter of Holwerda*, 29 B.R. 486 (M.D. Fl. 1983). This is the *Bilzerian* Second View.

Actually, as of November 1, 2005, four federal appellate circuits (i.e. 4th Circuit, 5th Circuit, 6th Circuit and 9th Circuit) have ruled on the "obtained by" "benefit" issue.

Every federal appellate decision prior to the Ninth Circuit's Opinion in the case *sub judice* required the debtor to "obtain" a

direct or indirect benefit from the fraudulent conduct as a predicate finding to application of the 11 U.S.C. § 523(a)(2)(A) "fraud" debt non-discharge exception.

For example, *In re Arm*, 87 F.3d 1046 (9th Cir. 1996), the Ninth Circuit held "We make clear, what we have not held before, that the indirect benefit to the debtor from a fraud in which he participates is sufficient to prevent the debtor from receiving the benefits that bankruptcy accords the honest person. *See In re Ashley*, 903 F.2d 599, 604 n.4 (9th Cir. 1990)."

Similarly, in the *Arm* cited Ninth Circuit case *In re Ashley*, 903 F.2d 599, n.5 (9th Cir. 1990), the Court stated:

> One may characterize this event in either of two ways: (a) Ashley was sufficiently closely related to AMM to be considered a recipient of the (Sic: fraudulently procured) $61,000 loan; or (b) although not a recipient of the $61,000, Ashley did profit because he had a financial interest in AMM. On either theory, Ashley obtained "money, property, services . . . or . . . credit" for himself. 11 U.S.C. § 523(a)(2).

The debtor in *In re Pleasants*, 219 F.3d 372 (4th Cir. 2000) argued the *Bilzerian* First View in an attempt to discharge approximately $1,227,296 of the $1,262,296 "fraud" damage judgment in favor of creditor Kendrick. Pleasants, who fraudulently represented himself to be a licensed and qualified architect, directly *received* at least $35,000 in architectural fees as a result of his fraudulent representations. *See* interim appellate decision *In re Pleasants*, 231 B.R. 893, 896 (E.D. Va. 1999). Pleasants admitted the $35,000 he received was non-dischargeable under 11 U.S.C. § 523(a)(2)(A) but argued the remainder of the fraud damages (Sic: approximately $1,227,296) was dischargeable under the First View because the excess $1,227,296 was not "received by him". *See In re Pleasants*, 231 B.R. 893, n.11 (E.D. Va. 1999). Relying on *Cohen v. De La Cruz*, 523 U.S. 213 (1998), the Fourth Circuit found the entire $1,227,296 debt was non-dischargeable under 11 U.S.C.

§ 523(a)(2)(A) holding "The Supreme Court found that the tenants' entire claim was non-dischargeable, not simply the portion of the claim that was transferred to the fraudulent debtor". *In re Pleasants*, 219 F.3d at 375. Clearly, the *Pleasants* decision is consistent with and applied the *Bilzerian* "Second View" . . . the "receipt of benefits" theory premised on Pleasants receipt of $35,000 cash from the fraud.

Cohen v. De La Cruz, 523 U.S. 213 (1998) suggests the Bilzerian Second View should be followed . . . the "Receipt of Benefit" theory.

In *De La Cruz* The Court stated "The most straight forward reading of § 523(a)(2)(A) is that it prevents discharge of 'any debt' respecting '*money, property*, or . . . *credit*' that the *debtor has fraudulently obtained*, including treble damages assessed on account of the fraud" (Emphasis supplied), *Cohen v. De La Cruz*, 523 U.S. at 218. "When construed in the context of the statute as a whole, then, § 523(a)(2)(A) is *best read* to prohibit the discharge of any liability arising from *debtor's fraudulent acquisition* of *money, property, etc.* . . ." (Emphasis supplied). *Id.* at 220-221.

In *De La Cruz* the debtor received rent payments by the fraudulent act of charging rents above the limit permitted by local law. The trial court awarded the defrauded tenants treble damages, attorneys fees and costs. On appeal the debtor argued the *Bilzerian* First View . . . namely,

> Petitioner submits that § 523(a)(2)(A) excepts from discharge only that portion of the damages award in a fraud action corresponding to the *value* of the "money, property, services, or . . . credit" the debtor obtained by fraud. The essential premise of petitioner's argument is that a "debt for" money, property or services obtained by fraud is necessarily limited to the value of the money, property or services received by the debtor.

Id. at 219. The debtor conceded the rent money he actually received from the fraud was non-dischargeable under

§ 523(a)(2)(A) . . . but, he argued the excess (i.e. the trebling of damages, attorney's fees and costs) over the amount he received was dischargeable under the *Bilzerian* First View.

The *De La Cruz* decision rejected the First View theory holding that *once* it is established the debtor received money (i.e. benefited) from the fraud *then all* the damages flowing from the fraud are non-dischargeable under § 523(a)(2)(A) without regard to whether or not the debtor benefited from the excess amount over the amount actually received by the debtor. *De La Cruz* clearly adopted the *Bilzerian* Second View.

Actually, The Court's preference of the Second View should have been foreseeable as early as 1991. In *Grogan v. Garner*, 498 U.S. 279, n.2 (1991) The Court said "Arguably, fraud judgments in cases in which the defendant did not obtain money, property, or services from the plaintiffs and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6)" (Emphasis supplied). *See, also*, *Fields v. Mans*, 516 U.S. 59 (1995).

The Ninth Circuit Opinion (Appendix A, page 5a) recognized prior appellate decisions applied the "receipt of benefits" Second View in 11 U.S.C. § 523(a)(2)(A) cases when the Ninth Circuit observed:

> It is true that this circuit and others have held that the debtor must have received a direct or indirect benefit from his or her fraudulent activity in order to make out a violation of § 523(a)(2)(A). *See, e.g.*, *In re Arm*, 87 F.3d 1046, 1049 (9th Cir. 1996) ("We make clear . . . that the indirect benefit to the debtor from a fraud in which he participates is sufficient to prevent the debtor from receiving the benefits that bankruptcy law accords the honest person."); *In re Bilzerian*, 100 F.3d 886, 891 (11th Cir. 1996) ("In light of persuasive circuit authority, we conclude in this case that the district court properly applied the 'receipt of benefits' theory in concluding that Bilzerian's debt . . . was subject to

the § 523(a)(2)(A) exception to discharge."); *Matter of Luce*, 960 F.2d 1277, 1283 (5th Cir. 1992) ("[T]he Code dictates that a particular debt is non-dischargeable '[i]f the debtor benefits in some way' from the money, property, services, or credit obtained through deception."). However, these rulings were made before the Supreme Court's decision in *Cohen v. De La Cruz*, 523 U.S. 213, 223 (1998).

But, then, the Ninth Circuit Opinion erroneously and prejudicially departed from The Law by misconstruing *Cohen v. De La Cruz*, 523 U.S. 213 (1998) in direct conflict with prior decisions of this Court and all federal appellate court circuits, to wit:

> Although the Court's opinion in *Cohen* did not address the precise issue presented in this case — whether a debtor must have obtained some benefit from the fraud for a debt to be held nondischargeable under § 523(a)(2)(A) — the Court's analysis in *Cohen* indicates that a finding of debt due to fraud is all that is necessary to satisfy § 523(a)(2)(A). *Id.* The Fifth Circuit and Fourth Circuit have found as much in two cases since *Cohen* was decided. *In re MM. Winkler & Assocs.*, 239 F.3d 746, 749 (5th Cir. 2001); *In re Pleasants*, 219 F.3d 372, 375 (4th Cir. 2000) (stating that the language of *Cohen* is "broad enough to encompass a situation in which no portion of a creditor's claims was literally transferred to the fraudulent debtor"). As the Fifth Circuit noted, "*Cohen* indicates that whether the debt arises from fraud is the only consideration material to nondischargeability. It also indicates that we should not read requirements like receipt of benefits into § 523(a)(2)(A) and that the discharge exceptions protect fraud victims rather than debtors." *Winkler*, 239 F.3d at 749. In light of *Cohen*, the Fourth and Fifth Circuit's analysis of the "obtained by" language

> in § 523(a)(2)(A) is sound, and should be adopted. It is only the fact of an adverse fraud judgment, and nothing more, that is required for a debt to be nondischargeable. Accordingly, we find that in light of *Cohen,* the receipt of a benefit is no longer an element of fraud under § 523(a)(2)(A).

The Ninth Circuit Opinion misconstrued and misapplied *In re M.M. Winkler*, 239 F.3d 746 (5th Cir. 2001) and *In re Pleasants*, 219 F.3d 372 (4th Cir. 2000) (*See* page 15, *supra*).

In *Winkler* the innocent partner debtors were stuck under general partnership law principles with the finding that *all* the partners (including "innocent" partners) of the partnership indirectly or directly "benefited" from the fraud of a "guilty" partner. *In re M.M. Winkler*, 239 F.3d at 751. The Winkler partnership in fact received $3,500 from the defrauded client for partnership "accounting services rendered". The "innocent" partner debtors argued they received no direct, actual personal benefit from the fraud . . . the so-called *Bilzerian* First View described above. *Winkler* rejected the First View. Instead, *Winkler* adopted the Second View by holding "Confronted with this precise question, we hold that § 523(a)(2)(A) prevents an innocent debtor from discharging liability for the fraud of his partners, regardless of whether he receives a monetary benefit." *Id.* Winkler merely stands for the proposition that an "indirect, imputed benefit" from the fraud is all that is necessary to invoke § 523(a)(2)(A) . . . i.e. no "direct, personal benefit" is required as the innocent partners urged.

Therefore, in fact, *Winkler* and *In Re Pleasants* are each consistent with *De La Cruz. Winkler* and *In Re Pleasants* are also consistent with the "indirect, imputed benefit" Second View decisions in *In re Bilzerian*, 100 F.3d 886 (11th Cir. 1996), *In re Arm*, 87 F.3d 1046 (9th Cir. 1996), *Ashley v. Church (In re Ashley)*, 903 F.2d 599 (9th Cir. 1990), *BancBoston Mortgage Corp. v. Ledford (In re Ledford)*, 970 F.2d 1556 (6th Cir. 1992) and *Luce v. First Equipment Leasing Corp. (In re Luce)*, 960 F.2d 1277 (5th Cir. 1992).

The Ninth Circuit Opinion plainly misapplied and misconstrued the facts and holding in *In re M.M. Winkler*, *supra*, and *In Re Pleasants*, *supra*.

Therefore, the Ninth Circuit Opinion (Appendix A) is in direct conflict with the 11 U.S.C. § 523(a)(2)(A) "receipt of benefits" decisions by The Court in *Cohen v. De La Cruz, supra*, *Grogan v. Garner*, supra, and *Archer v. Warner*, *supra*, and the other federal court of appeals decisions mentioned above.

Properly viewed, excluding the Ninth Circuit Opinion (Appendix A), prior decisions by The Court and all the federal circuit court of appeals suggest a direct or indirect personal benefit to the debtor flowing from the fraudulent conduct is necessary to *establish* debt non-dischargeability under 11 U.S.C. § 523(a)(2)(A) ("Test #1").

However, once this Test #1 "benefit" from the fraud *is established*, then the *amount* of the debt deemed non-dischargeable is *not limited* to the fraud benefit/fruit *actually "obtained"* by the *debtor* . . . instead, "any debt" sums flowing from the fraud, including punitive damages, are non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

Clearly, to properly apply the doctrine of collateral estoppel, Prior Case was required to have necessarily and actually litigated the issue of whether Muegler actually "obtained" any direct or indirect "benefit" from the fraudulent conduct complained of. Of course, in the case *sub judice* the district court found ". . . it is undisputed that the issue of whether Appellant obtained a benefit from his conduct was not presented to the jury in the original suit" (Appendix D, page 49a; *R:1037*, lines 1-3). This finding is determinative . . . there was no "identity of issues" in the Prior Case and case *sub judice* upon which to premise collateral estoppel preclusion. The bankruptcy court, district court and Ninth Circuit committed prejudicial err as a matter of law by misapplication of relevant law in their summary judgment orders (*R:255,1033,1155,1162*).

Certiorari review of the Ninth Circuit's Opinion (Appendix A) is necessary for the reasons stated herein.

B.

Ninth Circuit Opinion Violated F.R.Civ.P. 56 And Decisions Establishing Standards For Review Of a Motion For Summary Judgment

It is well established the definitional boundaries of "actual fraud" under 11 U.S.C. § 523(a)(2)(A) mirror the essential elements of common law fraud. *In Re Eashai*, 87 F.3d 1082, 1086 (9th Cir. 1996); *In Re Hashemi*, 104 F.3d 1122, 1125 (9th Cir. 1996); *In Re Apte*, 96 F.3d 1319, 1322 (9th Cir. 1996).

These elements, expressed in the context of this case, are: (1) Muegler intentionally made a representation, (2) Muegler knew the representation was false when made, (3) Muegler made the representation with the intention and purpose of deceiving Creditors, (4) Creditors relied upon the representation and (5) Creditors directly and proximately were thereby caused to suffer damage. *In Re Eashai*, 87 F.3d at 1086.

It was Creditors initial burden, as summary judgment movants, to *prima facie* show Muegler committed either (a) "actual fraud" within the meaning of 11 U.S.C. § 523(a)(2)(A) or (b) "willful and malicious injury" under 11 U.S.C. § 523(a)(6). F.R.Civ.P. Rule 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *In Re Cardelucci*, 285 F.3d 1231,1233 (9th Cir. 2002) *In Re Su*, 290 F.3d 1140 (9th Cir. 2002).

Creditors relied upon Prior Case jury instructions and the Prior Case judgment to meet their burden.

Muegler contended below, and here, the "one or more" phrase used in the Prior Case jury instructions (*R:67-98*) did not necessarily and unambiguously require the jury to find in favor of Creditors and against Muegler on each of the essential elements of common law "actual fraud" . . . nor did these instructions require a finding that Muegler (as opposed to Muegler's law client Concepts Communication Management Corp.) caused Creditors to suffer "willful and malicious injury". And, therefore, "actual fraud" and/or "willful and malicious injury" within the meaning of the Bankruptcy Code were not

unambiguously adjudicated in the Prior Case. Accordingly, under Missouri law, the bankruptcy court, district court and Ninth Circuit each committed prejudicial err by applying the doctrine of collateral estoppel and granting/affirming summary judgment to Creditors. *Owens v. Government. Employers Insurance Co.*, 643 S.W.2d 308 (Mo. App. 1982).

The Prior Case jury liability verdict directing instruction (*R:75-76*) read:

> Your verdict must be for Plaintiff David Bening if you believe:
>
> First, Defendant Muegler represented to Plaintiff David Bening, intending that Plaintiff David Bening rely on such representation in investing in Concepts Communication or the central Illinois partnership, either that:
>
> (a) As of September 1988, Concepts Communication had been restructured and was then in compliance with all applicable securities registration laws,
>
> (b) All of the funds invested by Plaintiffs into Concepts Communication would be used exclusively for the legitimate ongoing business purposes of Concepts Communication,
>
> (c) A person from the State of Illinois had invested a substantial sum of money into Concepts Communication and such money was used to purchase the Glenayre paging and computer equipment and that equipment was owned by Concepts Communication,
>
> (d) The money Plaintiffs invested for the partnership interest for the central Illinois territory would be used exclusively for the legitimate

development and business expenses of that partnership, or

(e) The money Plaintiffs invested for the central Illinois territory was for a partnership interest, and

Second, any one or more of the representations submitted in paragraph First was false, and

Third, Defendant Muegler knew that any one or more of such representations was false at the time the representation was made, and

Fourth, one or more of such representations was material to Plaintiff David Bening's investments in Concepts or the central Illinois partnership,

Fifth, Plaintiff David Bening relied on one or more of such representations in making his investments in Concepts Communication or the central Illinois partnership, and in so relying Plaintiff David Bening was using ordinary care, and

Sixth, as a direct result of one or more of such representations Plaintiff David Bening was damaged.

The verdict directing instruction *(R:86-87)* related to Harre's claim was the same as the above excepting "Plaintiff Alfred Harre" was substituted for the words "Plaintiff David Bening".

The "one or more" terminology in instruction submissions Second, Third, Fourth, Fifth and Sixth render the entire judgment ambiguous on the 11 U.S.C. § 523(a)(2)(A) "actual fraud" and 11 U.S.C. § 523(a)(6) "willful and malicious injury" issues.

For example, the instruction would require the jury to return a verdict against Muegler if it found (1) Muegler made the representation set out at First [a] and such representation was true when made, (2) Muegler did *not* make any of the representations set out at First [b], [c], [d] or [e], instead, Muegler's client Concepts Communication Management Corp. made such representations, (3) that First [b] was false and was

known by Muegler to be false when made by client Concepts Communication Management Corp., (4) that Concept's First [b] false representation, but not Muegler First [a] representation, was material to Creditors investment decision, (5) that Creditors reasonably relied upon the First [b] false representation but did not rely or act on Muegler's First [a] truthful representation when making their investment decision and (6) Creditors thereby were directly caused to be damaged. The complained of representations were made by Muegler's law client Concepts Communication in its' Prospectus (*R:288*) and Joint Venture Agreement (*R:280,281,371,373*) with Creditors.

Under the submitted jury instructions the jury was not required to find *Muegler* (as opposed to Muegler's law client Concepts Communication) intentionally made a false representation in order to return a liability verdict in favor of Creditors on the trial liability issue. Simply put, Muegler was somehow held vicariously liable under these instructions for the misrepresentations of Muegler's law client Concepts Communication in the Prospectus and Joint Venture Agreement ... Muegler was not held liable for any alleged misrepresentations personally made by him. Muegler did not personally commit fraud upon anyone.

The above is a reasonable, plausible explanation for the jury verdict and the resulting judgment in Prior Case.

Here, in effect, the bankruptcy court, district court and Ninth Circuit improperly rewrote the Prior Case jury instructions as follows in order to erroneously conclude Muegler was adjudicated as having committed common law "actual fraud" and "willful and malicious injury" in Prior Case, to wit:

> Your verdict must be for Plaintiff David Bening if you believe:
>
> First, Defendant Muegler represented to Plaintiff David Bening, intending that Plaintiff David Bening rely on such representation in investing in Concepts Communication or the central Illinois partnership, either that:

(a) As of September 1988, Concepts Communication had been restructured and was then in compliance with all applicable securities registration laws,

(b) All of the funds invested by Plaintiffs into Concepts Communication would be used exclusively for the legitimate ongoing business purposes of Concepts Communication,

(c) A person from the State of Illinois had invested a substantial sum of money into Concepts Communication and such money was used to purchase the Glenayre paging and computer equipment and that equipment was owned by Concepts Communication,

(d) The money Plaintiffs invested for the partnership interest for the central Illinois territory would be used exclusively for the legitimate development and business expenses of that partnership, or

(e) The money Plaintiffs invested for the central Illinois territory was for a partnership interest, and

Second, one or more of the *paragraph First* representations *you find to have been made by Defendant Muegler* was false, and

Third, Defendant Muegler knew such representations *made by him* was false at the time the representation was made, and

Fourth, one or more of such *false* representations *by Defendant Muegler* was material to Plaintiff David Bening's investments in Concepts or the central Illinois partnership,

> Fifth, Plaintiff David Bening relied on one or more of *Defendant Muegler's false* representations in making his investments in Concepts Communication or the central Illinois partnership, and in so relying Plaintiff David Bening was using ordinary care, and
>
> Sixth, as a direct result of *Defendant Muegler's false* representations Plaintiff David Bening was damaged.

The bankruptcy court, district Court and Ninth Circuit were not at liberty to invoke a constrained construction of Prior Case instructions to warrant a non-dischargeable debt collateral estoppel outcome premised upon "actual fraud" or causing "willful and malicious injury".

Based upon the submitted jury instructions in Prior Case, one *cannot* say with reasonable certainty the jury verdict (or judgment thereon) found debtor Muegler either (a) guilty of committing common law "actual fraud" within the meaning of 11 U.S.C. § 523(a)(2)(A) or (b) guilty of causing "willful and malicious injury" to Creditors within the meaning of 11 U.S.C. § 523(a)(6).

Faced with this ambiguity dilemma, a Missouri Court clearly would conclude Creditors failed to meet their burden of proof to show there was an "identity of issues" in the prior case with the bankruptcy "actual fraud" and "willful and malicious injury" issues . . . and, a Missouri State Court would thereupon decline application of collateral estoppel to preclude litigation of these issues in the second proceeding. *Owens v. Government Employers Insurance Company*, 643 S.W.2d 308, 310 (Mo. App. 1982) ("Collateral estoppel would preclude him from relitigating any facts unambiguously decided in the garnishment action. [Citations omitted]. Since the trial court quashed the garnishment without specifying reasons, however, it is unclear which issues were determined. Sufficient ambiguity exists to deny application of the doctrine of collateral estoppel."); *King General Contractors v. Reorganized Church*, 821 S.W.2d 821 (Mo. banc 1991).

The Ninth Circuit refused to consider this issue holding :"Muegler also argues that the jury instructions in the original judgment were ambiguous. However, because Muegler did not raise this claim in the district court or bankruptcy court, Muegler has waived his right to make this claim on appeal." *Muegler v. Bening*, 413 F.3d 980, n.1 (9^{th} Cir. 2005); Appendix A, n.1.

First, contrary to the Ninth Circuit's footnote, Muegler did timely raise the instruction ambiguity issue both in the district court and the bankruptcy court.

Muegler argued throughout this case (in the bankruptcy court, district court and Ninth Circuit) the Prior Case "fraud" issues were not "identical" to the issues in this bankruptcy case and that the Prior Case jury instructions did not unambiguously show the jury found Muegler guilty of committing either "actual fraud" within the scope of 11 U.S.C. § 523(a)(2)A) or "willful and malicious injury" within the scope of 11 U.S.C. § 523(a)(6) due to the "one or more" terminology in instruction submissions Second, Third, Fourth, Fifth and Sixth. *See* Muegler's Genuine Issues Of Material Fact #5 and #6 (R:1079); Muegler's Genuine Issues Of Material Fact #13 and #14 (*R:1080,1081*); Muegler's Genuine Issues Of Material Fact #9 and #10 (*R:1080*); Muegler's Genuine Issues Of Material Fact #11 and #12 (*R:1080*); Muegler's Legal Memorandum Opposing Summary Judgment, page 3; Muegler's Legal Memorandum Opposing Summary Judgment, page 15-16 (*R:1073, 1074*); Muegler's Reply Brief, U.S. District Court (Phoenix), Cause CIV-02-632-PHX-JAT.

Second, the Ninth Circuit "waiver" holding is dead wrong as a matter of law.

The bankruptcy court's and district court's rulings are reviewed *de novo*. *In Re Cardelucci*, 285 F.3d 1231,1233 (9th Cir. 2002). Therefore, it was the Ninth Circuit's duty to *de novo* determine whether Creditors met their initial summary judgment burden in the bankruptcy court. Which Creditors did not meet.

Muegler, as the non-movant not bearing a burden of proof, was not required to come forward with any evidence and/or argument showing the existence of a genuine issue of material

fact if and until Creditors satisfied their initial summary judgment burden to *prima facie* establish "actual fraud" and/or "willful and malicious injury". F.R.Civ.P. Rule 56(c); *Anderson v. Liberty Lobby, Inc., supra*.

The nexus of Creditors' burden was to show, under Missouri collateral estoppel law [*Owens v. Government Employers Insurance Company*, 643 S.W.2d 308, 310 (Mo. App. 1982)], Prior Case jury instructions and Prior Case judgment unambiguously finally adjudicated the "actual fraud" and "willful and malicious injury" issues within the meaning and scope of the Bankruptcy Code.

In *Archer v. Warner*, 538 U.S. 314, 321 (2003), The Court cautioned federal courts against overextension of the collateral estoppel doctrine in bankruptcy cases, to wit:

> Congress also intended to allow the relevant determination [whether a debt arises out of fraud] to take place in bankruptcy court, not to force it to occur earlier in state court at a time when nondischargeability (SIC: bankruptcy) concerns "are not directly at issue and neither party has a full incentive to litigate them".

Ninth Circuit Opinion violated this concept.

As shown above, Creditors did *not* meet their initial F.R.Civ.P. 56 burden to show entitlement to judgment as a matter of law because the Prior Case judgment and the Prior Case jury instructions relied did not *prima facie* establish either the "actual fraud" or "willful and malicious injury" predicate essential elements to debt non-dischargeability under 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(6).

Accordingly, Ninth Circuit Opinion is in direct conflict with F.R.Civ.P. 56(c) and the standard for review holdings in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), *Archer v. Warner*, 538 U.S. 314 (2003), *In Re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002) and *In Re Su*, 290 F.3d 1140 (9th Cir. 2002).

The Ninth Circuit's "waiver" holding in effect relieved Creditors of their initial summary judgment burden to show the absence of a genuine issue of material fact (i.e. "actual fraud" and "willful and malicious injury) and their entitlement to summary judgment as a matter of law.

Muegler never had a burden to disprove either the Bankruptcy Code "actual fraud" or "willful and malicious injury" issues because Creditors did not *prima facie* establish either "actual fraud" or "willful and malicious injury" via the Prior Case ambiguous jury instructions. F.R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc., supra*; *In Re Cardelucci, supra*; and, *In Re Su, supra.*

Accordingly, it was impossible, under the applicable standard for review, for Muegler to have "waived" the ambiguous jury instruction issue as erroneously held by the Ninth Circuit (Appendix A).

Certiorari review of the Ninth Circuit's Opinion (Appendix A) is necessary for the reasons stated herein.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully suggests and requests The Supreme Court to grant certiorari review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 24, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-15259

D.C. No.
CV-02-00632-JAT

ARTHUR G. MUEGLER, JR.,

Appellant,

v.

DAVID J. BENING; ALFRED W. HARRE,

Appellees.

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted
April 13, 2005—San Francisco, California

Filed June 24, 2005

Appendix A

Before: Donald P. Lay,* Betty B. Fletcher, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Lay

OPINION

LAY, Circuit Judge:

Appellant Arthur G. Muegler, Jr., was found guilty in federal district court for committing intentional fraud under Missouri law. A jury awarded David J. Bening and Alfred W. Harre ("Creditors") compensatory and punitive damages. Muegler sought to discharge his debt to Creditors via bankruptcy proceedings in Arizona. Creditors filed a complaint, arguing that the debt owed to them by Muegler was procured by fraud and was thus nondischargeable under 11 U.S.C. § 523(a)(2)(A). Furthermore, Creditors argued, because the elements of fraud under Missouri law were identical to the elements of fraud under § 523(a), Muegler was collaterally estopped from re-litigating the issue of fraud in bankruptcy court.

The bankruptcy court held that the elements of fraud under Missouri law and § 523(a) were identical, and found that Muegler was collaterally estopped from challenging the fraud ruling in bankruptcy court. The bankruptcy court granted summary judgment to Creditors, holding that Muegler could not discharge his debt due to fraud. The district court affirmed.

* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix A

Under Missouri law, four factors must be satisfied for the application of collateral estoppel:

1. whether the issue decided in the prior adjudication was identical with the issue presented in the present action;

2. whether the prior adjudication resulted in a judgment on the merits; . . .

3. whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; [and]

4. whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

Hartsfield v. Barkley, 856 S.W.2d 342, 345 (Mo.Ct.App.1993). On appeal, Muegler argues that factors one, "identity of issues," two, a "judgment on the merits," and four, a "full and fair opportunity to litigate," were not satisfied by the fraud judgment against him under Missouri law.[1]

---

1. Muegler also argues that the jury instructions in the original judgment were ambiguous. However, because Muegler did not raise this claim in the district court or bankruptcy court, Muegler has waived his right to make this claim on appeal. *Marx v. Loral Corp.*, 87 F.3d 1049, 1055 (9th Cir.1996). We also note that Muegler challenged the jury instructions in a prior appeal, and those instructions were found unambiguous by a panel of the Eighth Circuit Court of Appeals. *Harre v. Muegler*, 113 F.3d 909 (8th Cir.1997).

Appendix A

A. Identity of Issues

Muegler presents two reasons why the "identity of issues" prong of Missouri's collateral estoppel test was not met. First, Muegler argues that under § 523(a)(2)(A), an essential element of the crime of fraud is whether he "obtained a direct or indirect benefit" from his misrepresentations. This "receipt of benefits" element is an additional element not present under Missouri law. Second, Muegler argues that § 523(a)(6) requires that he "willfully caused injury" to Creditors, while Missouri law only requires a finding that he recklessly caused injury to Creditors.

Section 523(a)(2)(A) provides that:

> (a) A discharge . . . does not discharge an individual debtor from any debt—. . .
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, *to the extent obtained by*—
> >
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

Id. (emphasis added). Muegler argues that the word "obtained" adds an additional element to a fraud offense under § 523(a)(2). According to Muegler, the use of "obtained" means that creditors must show that he obtained a direct or indirect benefit from his fraudulent conduct, or

that some portion of the Creditors' claim was actually transferred to Muegler. Because this element was lacking in the original judgment—the jury did not have to find that Muegler obtained a direct or indirect benefit from his fraud—Muegler argues that there is no "identity of issues" between the present suit and the original judgment.

It is true that this circuit and others have held that the debtor must have received a direct or indirect benefit from his or her fraudulent activity in order to make out a violation of § 523(a)(2)(A). *See, e.g., In re Arm,* 87 F.3d 1046, 1049 (9th Cir.1996) ("We make clear . . . that the indirect benefit to the debtor from a fraud in which he participates is sufficient to prevent the debtor from receiving the benefits that bankruptcy law accords the honest person."); *In re Bilzerian,* 100 F.3d 886, 891 (11th Cir.1996) ("In light of persuasive circuit authority, we conclude in this case that the district court properly applied the 'receipt of benefits' theory in concluding that Bilzerian's debt . . . was subject to the § 523(a)(2)(A) exception to discharge."); *Matter of Luce,* 960 F.2d 1277, 1283 (5th Cir.1992) ("[T]he Code dictates that a particular debt is nondischargeable '[i]f the debtor benefits in some way' from the money, property, services, or credit obtained through deception."). However, these rulings were made before the Supreme Court's decision in *Cohen v. de la Cruz,* 523 U.S. 213, 223, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998).

In *Cohen,* the creditor in a bankruptcy case was awarded treble damages, attorney's fees, and costs. *Id.* at 215-16. The debtor argued that attorney's fees, treble damages, and costs should not be deemed nondischargeable under § 523(a)(2)(A)

because § 523(a)(2)(A) only encompasses the *value* of the money, property, or services a debtor obtains from fraud. *Id.* at 217-18, 118 S.Ct. 1212. Therefore, to the extent that punitive or compensatory damages exceed the amount actually obtained by the debtor from fraud, the award is not subject to § 523(a)(2)(A).

The Supreme Court found that the overriding purpose of § 523 is to protect victims of fraud. *Id.* at 222-23, 118 S.Ct. 1212. Therefore, without any indication from Congress in § 523(a)(2)(A) itself, the Court found it unlikely that a debtor would be held responsible only for restitutionary damages arising from fraud. *Id.* at 223, 118 S.Ct. 1212. The Court held that

> [T]he text of § 523(a)(2)(A), the meaning of parallel provisions in the statute, the historical pedigree of the fraud exception, and the general policy underlying the exceptions to discharge all support our conclusion that 'any debt . . . for money, property, or services, or . . . credit, to the extent obtained by' fraud *encompasses any liability arising from money, property, etc., that is fraudulently obtained,* including treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor.

Id. (emphasis added).

Although the Court's opinion in *Cohen* did not address the precise issue presented in this case—whether a debtor must have obtained some benefit from the fraud for a debt to

be held nondischargeable under § 523(a)(2)(A)—the Court's analysis in *Cohen* indicates that a finding of debt due to fraud is all that is necessary to satisfy § 523(a)(2)(A). *Id.* The Fifth Circuit and Fourth Circuit have found as much in two cases since *Cohen* was decided. *In re M.M. Winkler & Assocs.*, 239 F.3d 746, 749 (5th Cir.2001); *In re Pleasants*, 219 F.3d 372, 375 (4th Cir.2000) (stating that the language of *Cohen* is "broad enough to encompass a situation in which no portion of a creditor's claims was literally transferred to the fraudulent debtor"). As the Fifth Circuit noted, "*Cohen* indicates that whether the debt arises from fraud is the only consideration material to nondischargeability. It also indicates that we should not read requirements like receipt of benefits into § 523(a)(2)(A) and that the discharge exceptions protect fraud victims rather than debtors." *Winkler*, 239 F.3d at 749.

In light of *Cohen*, the Fourth and Fifth Circuit's analysis of the "obtained by" language in § 523(a)(2)(A) is sound, and should be adopted. It is only the fact of an adverse fraud judgment, and nothing more, that is required for a debt to be nondischargeable. Accordingly, we find that in light of *Cohen*, the receipt of a benefit is no longer an element of fraud under § 523(a)(2)(A).

Muegler also argues that there is no "identity of issues" because the Missouri fraud judgment did not require a finding that his conduct was "willful or malicious." Under Missouri law, a jury may award punitive damages only upon a finding of evil motive, reckless indifference, or constructive knowledge. *Ackmann v. Keeney-Toelle Real Estate Co.*, 401 S.W.2d 483, 489 (Mo.1966). However, 11 U.S.C. § 523(a)(6) states that "a discharge . . . does not discharge an individual

debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity. . . ." Under this provision, reckless conduct or evil motive are insufficient to qualify as "willful and malicious" injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 64, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). Because punitive damages may be awarded based upon a lower standard than what is required by § 523(a)(6), Muegler argues that there is no "identity of issues" between the punitive damages award in the original judgment and the present bankruptcy proceeding.

Although Missouri law allows a jury to find guilt based upon a lower standard than that required by § 523(a)(6), in this case the Missouri jury instructions regarding culpability clearly required a finding that Muegler intended his misrepresentations to harm the Creditors. The jury found that Muegler willfully committed fraud, and awarded compensatory damages to the Creditors based upon its finding. The subsequent award of punitive damages, moreover, was based upon the culpability found by the jury in its compensatory damages award.

When the awards of compensatory damages and punitive damages are based upon the same conduct, the punitive damages award will be nondischargeable under § 523(a)(6) if the compensatory damages award is found to be nondischargeable. *In re Adams*, 761 F.2d 1422, 1428 (9th Cir.1985). Because the compensatory damages award is nondischargeable and the award of punitive damages was based upon the same finding of guilt, the standard for a finding of fraud under Missouri law and § 523(a)(6) are identical for the purposes of this case. *See In re Scarborough*,

171 F.3d 638, 644 (8th Cir.1999) (addressing an almost identical situation under Missouri law).

We find that the "identity of issues" prong of the Missouri collateral estoppel test has been satisfied in this case. In the original judgment, the jury found that Muegler committed fraud within the meaning of § 523(a)(6). Moreover, § 523(a)(2)(A) does not require a showing that the debtor received a benefit, whether direct or indirect, from his or her fraudulent misrepresentation.

B. Judgment on the Merits

Muegler next contends that the issues pertaining to the present case were not "actually adjudicated" in the original trial, and thus the original judgment did not constitute a final judgment on the merits. Muegler argues that the original adjudication was not a final judgment on the merits because of the discovery and trial sanctions placed upon him by the court—sanctions that Muegler claims made the original judgment more like a default judgment, rather than a judgment on the merits.

Muegler's claim must fail. Missouri courts and bankruptcy courts have held that when a debtor files an answer in the case, thus requiring a trial to prove matters not admitted in the pleadings, the subsequent judgment is a judgment on the merits, not a default judgment. *In re Day,* 137 B.R. 335, 339 (Bankr.W.D.Mo.1992); *DuPont v. Bluestein,* 994 S.W.2d 96, 97 (Mo.Ct.App.1999). Muegler filed an answer and participated in the trial, and the state court judgment actually adjudicated each issue relating to

the fraud accusations against Muegler. The sanctions ordered by the district court were a result of Muegler's own obstructionist tactics, and did not affect whether the Missouri judgment constituted a judgment on the merits.

C. Full and Fair Opportunity to Litigate

Lastly, Muegler contends that because of the sanctions levied against him in the Missouri judgment, he was not afforded the procedural opportunities that would be available to him in another forum. *See Bi-State Dev. Agency v. Whelan Sec. Co.*, 679 S.W.2d 332, 337 (Mo.Ct.App.1984) (stating that a party may not have a "full and fair opportunity to litigate" when a second forum affords procedural opportunities not available in the original action).

Again, Muegler's argument must fail. The relevant procedural opportunities in this case were the procedural opportunities available to Muegler at the beginning of the original trial, not the procedural opportunities taken away from him due to his abuse of the discovery process. *See In re Daily*, 47 F.3d 365, 368 (9th Cir.1995) (stating that "the 'actual litigation' requirement may be satisfied by substantial participation in the adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so"). Without regard to sanctions placed upon Muegler due to his own abuses, bankruptcy courts afford the same procedural opportunities that were available to Muegler at the beginning of the original district court trial. Accordingly, we find that Muegler was given a full and fair opportunity to litigate in the original trial.

CONCLUSION

For the foregoing reasons, we hold that Muegler is collaterally estopped from re-litigating the issue of fraud in bankruptcy court, and AFFIRM the judgment of the district court.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED JANUARY 29, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV-02-632-PHX-JAT

In the Matter of:

Arthur G. Muegler, Jr.,

Debtor,

David J. Bening

and

Alfred W. Harre

Plaintiffs/Appellees

v.

Arthur G. Muegler, Jr.,

Defendant/Appellant

Appendix B

ORDER

Pending before this Court is an appeal of a grant of summary judgment in favor of Appellees.[1]

I. STANDARD OF REVIEW

Rule 8013 of the Federal Rules of Bankruptcy Procedure states:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a

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1. Appellant has requested oral arguments on the briefs in this case. Rule 8012 of the Federal Rules of Bankruptcy Procedure states:

> Oral argument shall be allowed in all cases unless the district judge or the judges of the bankruptcy appellate panel unanimously determine after examination of the briefs and record, or appendix to the brief, that oral argument is not needed. Any party shall have an opportunity to file a statement setting forth the reason why oral argument should be allowed.
>
> Oral argument will not be allowed if (1) the appeal is frivolous; (2) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

In this case, the Court finds that the facts and legal arguments were adequately presented in the briefs and the record, including the transcript from oral argument before the Bankruptcy Court, and the decisional processes would not have been significantly aided by oral argument.

> bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Thus, this Court will review the Bankruptcy Court's conclusions of law *de novo,* but will not reverse the Bankruptcy Court's findings of fact unless they are clearly erroneous. *See United States v. Olson,* 4 F.3d 562, 564 (8th Cir. 1993).

II. FACTUAL AND PROCEDURAL BACKGROUND

The relationship of the parties in the adversary case that is the subject of this appeal began in 1988. Arthur Muegler, Jr. (the debtor in the bankruptcy case and the Appellant herein) was acting as attorney for Concepts Communication. Appellant received payment for his legal services from Concepts Communication.[2] David Bening and Alfred Harre (the Plaintiffs in the adversary case and Appellees herein) invested in Concepts Communication. Appellees investment was unsuccessful. Additionally, the transactions of the Concepts Communication ultimately gave rise to a fraud prosecution of at least one of its principals.

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2. The Court notes that Appellant received payment for only some of his outstanding fees. The total payment received was $21,937.50.

Appendix B

Following the loss of their investment, Appellees sued Appellant in the federal district court of Missouri for fraud.[3] Appellees were successful before a jury and received a judgment in the amount of $130,000 compensatory damages and $130,000 punitive damages each, for a total judgment in the amount of $520,000. The case was appealed to the Eighth Circuit Court of Appeals. The Court of Appeals affirmed the judgments.

Appellant then filed for bankruptcy in Arizona. Appellees properly established their claim against Appellant in the adversary case. Appellant is now attempting to discharge the debt owed to Appellees through the bankruptcy proceeding. However, under 11 U.S.C. § 523, debts incurred by reason of fraud are not dischargable in bankruptcy. Thus, the issue before the Bankruptcy Court was whether the debt owed to Appellees is dischargable in bankruptcy.

Appellees filed a motion for summary judgment in the bankruptcy proceeding alleging that under the doctrine of collateral estoppel, Appellant is estopped from arguing that the debt they are owed was not procured by fraud and was, therefore, dischargable. Appellees theory was that the issue of whether Appellant committed fraud was previously litigated in the state law fraud case. Further, Appellees allege, the elements proven in the state law fraud case were identical to the elements for non-dischargability under 11 U.S.C. § 523. As a result, Appellees contend, Appellant is collaterally estopped from re-litigating this issue.

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3. The case was a state law fraud case that was in federal court based on diversity jurisdiction.

The Bankruptcy Court agreed with Appellees and granted their motion for summary judgment. (Doc. #13A, Volume IV of IV, pg. 1155). Appellant appealed to this Court.

III. DISCUSSION

As indicated above, the Bankruptcy Court granted summary judgment in Appellees favor based on collateral estoppel. Appellant raises three issues on appeal as to why collateral estoppel should not apply: 1) no "identity of issues" exists with the previous case; 2) the issue on which collateral estoppel is sought was not "actually adjudicated"; and 3) the party against whom collateral estoppel is being applied was not given a "full and fair opportunity to litigate" in the prior litigation.

It is undisputed between the parties that the law where the original judgment was obtained shall control whether collateral estoppel will prevent a party from re-litigating an issue in another action. Under Missouri law, the Court considers four factors in determining whether collateral estoppel applies: 11) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; . . . (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; [and] (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit." *Hartsfield v. Barkley*, 856 S.W.2d 342, 345 (Mo. Ct. App. 1993).

In a previous appeal to this Court, Appellant argued that neither factor one nor factor four were satisfied in this case; therefore, collateral estoppel should not apply. *See In re Muegler,* CV-00-1522-PHX-JAT. In that case, this Court ruled that factor one of collateral estoppel, identity of issues, was satisfied in this case. With respect to factor four, this Court remanded this case to the Bankruptcy Court for further development of the record on whether Appellant had a full and fair opportunity to litigate in the previous action. Notably, in this appeal, Appellant again appeals whether factors one and four are present to apply collateral estoppel in this case. Further, Appellant has now added a claim that factor two also is not present in this case. Based on these alleged reasons why collateral estoppel should not apply, Appellant argues that he should be given a new trial in the Bankruptcy Court.

A. IDENTICAL ISSUES IN PREVIOUS CASE

As indicated above, Appellant argues that there were not identical issues in the prior litigation. Appellant claims that two items must be found by the Bankruptcy Court for a debt to be non-dischargable under 11 U.S.C. § 523[4] that were

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4. 11 U.S.C. § 523 provides:

"(a) A discharge under . . . this title does not discharge an individual debtor from any debt— . . .

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(Cont'd)

not found in the prior litigation; therefore, the issues are not identical. Specifically, Appellant argues that the two requirements for a debt to be non-dischargable, which were not found in the prior litigation, are: 1) that the debtor "obtained money" or "obtained a direct or indirect benefit" from the misrepresentations, and 2) that the debtor willfully caused the injury.

1. OBTAIN BENEFIT

In the previous appeal before this Court, this Court found:

> ". . . [I]t is undisputed that the issue of whether Appellant obtained a benefit from his conduct was not presented to the jury in the

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(Cont'd)

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's fmancial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive. . . ."

original suit. Thus, this Court is asked to determine what the word "obtained" in 11 U.S.C. § 523 requires. When interpreting statutes, Courts are to give effect if possible to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Nonetheless, Appellees argue that obtain in this context does not add any additional requirement to the statute beyond the fraud elements proven in the original case. The Bankruptcy Court agreed with this analysis also citing *Pleasants* [219 F.3d 372 (4th Cir. 2000)].

In *Pleasants*, the Fourth Circuit Court of Appeals held that "obtained" does not require that any portion of the creditor's claim in the adversary bankruptcy case actually be transferred to the debtor. 219 F.3d at 375. The *Pleasants* Court concluded that the fact that money was paid by the creditor to unrelated third parties as a result of the fraud committed by the debtor was sufficient for the debt to be non-dischargable under 11 U.S.C. § 523. Appellees urge this Court to extend this analysis to conclude that the word obtain does not require that any additional element be proven in a case tried under 11 U.S.C. § 523.

In the Ninth Circuit, the Court of Appeals has outlined what must be found for a debt to be non-dischargable under 11 U.S.C. § 523(a): 1) That a representation of fact was made by the debtor; 2) That the representation was material; 3) That the debtor knew the representation was false;

> 4) That the debtor made the representation with the intention of deceiving the creditor; 5) That the reliance of the creditor was justified; and 6) That the damage proximately resulted. *See In re Arm,* 87 F.3d at 1049. The Court of Appeals went on to state that an indirect benefit to the debtor was *sufficient* to prevent a debt from being discharged. *Id.* However, the Court of Appeals did not add an element which required a finding that the debtor receive *at least* an indirect benefit. Thus, the elements required to be proven in the Ninth Circuit to prevent a debt from being discharged do not include an element that the debtor "obtain" any benefit, even an indirect one.[5]

In re Muegler, CV-00-1522-PHX-JAT. The briefs currently before the Court do not present any reason for this Court to reconsider this previous holding.

2. WILLFULLY CAUSED INJURY

Again this argument of Appellant is very similar to the argument he raised before this Court in his previous appeal. Previously, this Court found:

> "At pages 24-25 of Appellant's Opening Brief, Appellant lists the jury instructions given

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5. Some commentators in the bankruptcy area have stated that it would be unlikely that there would be an issue of whether the debtor received a benefit under 11 U.S.C. § 523 because it would be unlikely that someone would commit fraud without receiving any benefit from their actions. *See e.g.* 3 NORTON BANKR. L. & PRAC. 2d § 47:15, n.33.

in the original suit. [In this case, pages 31-32 of Appellant's Opening brief.] This Court finds that the instructions listed would require the jury to find each element required in the Ninth Circuit to prevent a debt from being discharged under 11 U.S.C. § 523. Thus, the Court finds that the issues were identical with respect to the compensatory damages.

Appellant's second argument addresses whether there were identical issues with respect to the award of punitive damages due to the different culpability standards. Appellee's response to this argument is that by sending the issue of punitive damages to the jury the Missouri district court necessarily found Appellant's conduct to be intentional, even though the jury only had to find recklessness to assess punitive damages. Further, Appellees argue, once the intentional fraud elements are established, under *Cohen v. de la Cruz*, 523 U.S. 213 (1998), all damages arising from that fraud are also non-dischargable in bankruptcy.

Clearly, under *Cohen*, punitive damages arising from fraudulent conduct will not be discharged in bankruptcy. *Id.* at 223. However, that is not the only inquiry in this case. The second inquiry in this case is whether there are identical issues in the award of punitive damages in the original case and the non-discharge of fraudulently obtained debts under 11 U.S.C. § 523 in this case.

While the Court finds that Appellant makes a compelling argument that the standard for an award of punitive damages in the original suit was not the same as the standard for a debt to be non-dischargable under 11 U.S.C. § 523, punitive damages cannot be considered in a vacuum. Punitive damages will not be assessed if there is not liability on the underlying cause of action. Punitive damages only exist because of the finding of liability for the underlying action. *See In re Scarborough,* 171 F.3d 638, 644 (8th Cir. 1999). Additionally, this Court finds that the punitive damages in this case arise from the same conduct as the compensatory damages.

In the original suit, the jury assessed punitive damages after it found Appellant liable for fraud. This finding of liability on the underlying action was necessary before punitive damages could be assessed. This Court has already concluded that there were identical issues in the finding of liability in the compensatory damages phase of the original suit and in the standard for a debt to be non-dischargable under 11 U.S.C. § 523 in this suit. Thus, the jury finding of culpability for the compensatory damages, a prerequisite to an assessment of punitive damages, results in the jury having necessarily found the elements for the compensatory damages award in the punitive damages award. Therefore, because identical issues exist for purposes of the compensatory damages award they also exist for the punitive

damages award. As a result, the Bankruptcy Court did not err in finding that there were identical issues in the original suit."

In re Muegler, CV-00-1522-PHX-JAT. The briefs currently before the Court do not present any reason for this Court to reconsider this previous holding. Accordingly, the Court again finds that the issues litigated in the previous case were identical to the issues on which collateral estoppel is sought in this case.

B. ACTUALLY ADJUDICATED

Though not raised in his previous appeal, Appellant now argues that the actually adjudicated prong of collateral estoppel was not met in this case. When this Court remanded this case to the Bankruptcy Court, this Court remanded solely on the issue of whether Appellant received a full and fair opportunity to litigate in the previous action. The Bankruptcy Court presumed, correctly, that this Court had affirmed its grant of summary judgment on all other elements of collateral estoppel. Accordingly, the issue of whether fraud was actually adjudicated in the prior state law proceeding was never addressed by the Bankruptcy Court on remand. Thus, Appellant must now be seeking to have this Court review the Bankruptcy Court's original grant of summary judgment (which Appellant has included in the record on appeal). (Doc. #13A, Volume I of IV, pgs. 251, 255-56.) The Court is unclear, as a procedural matter, why Appellant was not required to raise this issue in his first appeal. However, Appellee has not objected on a procedural ground to Appellant raising this argument for the first time in this

second appeal, so the Court will address the merits of the argument.

Appellant's argument on this point is that the prior litigation was in essence a default judgment because Debtor/Appellant was not allowed to present any evidence as a discovery sanction.[6] Basically, Debtor/Appellant's argument is that nothing except the discovery sanction was actually litigated in the prior litigation. This argument, however, ignores the jury verdict reached in the prior litigation.

In the prior litigation, Creditors/Appellees put on sufficient evidence to convince a jury that Debtor/Appellant defrauded them. Thus, the prior litigation was not an action decided by default against Debtor/Appellant, but by jury verdict. Debtor/Appellant argues that because he could not present evidence, the jury did not really decide the fraud issue. However, this argument is inconsistent with the facts. The issue sent to the jury was not the validity of the discovery sanction against Debtor/Appellant, but the fraud issue as evidenced by the jury instructions. Thus, this issue was actually adjudicated, or reached a final judgment on the merits, *i.e.* a jury verdict. *See Brooks v. Brooks,* 800 S.W.2d 468, 470 (Mo.App. E.D. 1990) (holding that a judgment reached in a case where appellant failed to appear at trial

6. There is some factual dispute in the record from oral argument before the Bankruptcy Court as to whether Debtor/Appellant was allowed to present limited evidence or no evidence in the prior litigation. For purposes of this Order, the Court will assume the facts in the light more favorable to the Debtor/Appellant and presume that Debtor/Appellant was not allowed to present any evidence in the prior litigation.

was a judgment on the merits); *DePont v. Bluestein*, 994 S.W.2d 96, 97 (Mo.App. S.D. 1999) (finding that when a party files an answer, a subsequent judgment is not a default judgment, but a judgment on the merits); *In re Day*, 137 B.R. 335, 339-340 (Bankr. W.D.Mo.1992) (holding that after a party files an answer a subsequent judgment is on the merits for purposes of later use in another case under a collateral estoppel theory); *In re Quinn*, 170 B.R. 1013, 1016-17 (Bankr. E.D. Mo. 1994) (holding that even when the debtor was absent from trial, the issues were actually adjudicated/litigated); *In re Suds*, 240 B.R. 899, 906 (Bankr. W.D.Mo. 1999) (holding that because the debtor answered in the state court proceeding, and detailed findings had to be made in the state proceeding on fraud claim, fraud issue had be actually adjudicated/litigated in prior state court action); *but see Peoples-Home Life Ins. Co. v. Haake*, 604 S.W.2d 1, 8-9 (Mo.App. W.D. 1980) (holding that dismissal as a discovery sanction was not a judgment on the merits).

Because this case resulted in a jury verdict on the exact issue on which collateral estoppel is sought (see above for discussion of identity of issues), the Court finds that the issue was actually adjudicated in the prior action, which resulted in a final judgment on the merits. Accordingly, the Court finds that this prong of collateral estoppel has been met.

C. FULL AND FAIR OPPORTUNITY TO LITIGATE

Under Missouri law, the Court considers four factors in determining whether a party previously had a full and fair opportunity to litigate an issue: "(1) whether the person

opposing estoppel had a strong incentive to litigate in the first action; (2) whether the second forum may afford the party opposing estoppel procedural opportunities not available in the first action; (3) whether the judgment upon which estoppel rests does not comport with one or more prior judgments; and (4) [whether] the first action's forum may have substantially inconvenienced the party opposing estoppel." *Miller v. Pool and Canfield Inc.*, 800 S.W.2d 120, 125 (Mo. Ct. App. 1990). In the prior appeal, this Court considered these four factors, and determined that this case had to be remanded to the Bankruptcy Court for further development of the record on the issue of whether these four factors were met in this case.

On remand, the Bankruptcy Court had briefing and oral argument on this issue. At pages 21-34 of the transcript of March 26, 2002, the Bankruptcy Court issued its findings. (Doc. # 13A, Volume IV of IV; these pages are not numbered as part of the record, but can be found at the very end of Volume IV). The Court has reviewed these findings and conclusions and agrees with the reasoning and conclusion of the Bankruptcy Court. Accordingly, this Court adopts those findings and conclusions for purposes of this Order. Thus, like the Bankruptcy Court, this Court also finds that the Appellant was given a full and fair opportunity to litigate in the prior action.

IV. CONCLUSION

In this appeal, Appellant argued that three of the prongs of collateral estoppel had not been met; thereby precluding collateral estoppel from being applied against Appellant. For

the reasons stated above, the Court has found that all of the prongs of collateral estoppel are met in this case. Accordingly, the Court will affirm the Bankruptcy Court's grant of summary judgment in favor of Appellees and against Appellant (holding that Appellant's debt to Appellees is not dischargable under 11 U.S.C. § 523).

Based on the foregoing,

IT IS ORDERED that Appellant's Request for Oral Argument is denied; Appellees request for submission on the briefs (Doc. #18) is granted;

IT IS FURTHER ORDERED that the decision of the Bankruptcy Court is affirmed;

IT IS FURTHER ORDERED that the Clerk of the Court shall forward a copy of this Order to the Bankruptcy Court, and this Order shall serve as the Mandate in this case.

DATED this 28 day of January, 2003.

s/ James A. Teilborg
James A. Teilborg
United States District Judge

APPENDIX C — ORDER AND EXCERPTED TRANSCRIPT OF PROCEEDINGS DATED MARCH 26, 2002

UNITED STATES BANKRUPTCY COURT DISTRICT OF ARIZONA

99-05531-PHX-RJH

ADV. 99-00700

In re:

ARTHUR G. JR. MUEGLER CH. 7

1) DAVID J. BENING vs ARTHUR G. JR. MUEGLER

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

2) CASE MANAGEMENT SCHEDULING ORDERS

U.S. Bankruptcy Court
2929 N. Central Ave., 9th Floor
Phoenix, AZ 85012

March 26, 2002
11:15 a.m.

BEFORE THE HONORABLE
RANDOLPH J. HAINES, Judge

* * *

Appendix C

[commencing at page 21]

* * *

THE COURT: We're getting far beyond your brief rebuttal. Mr. Waltrip, I think I've heard enough at this point. Based on Judge Teilborg's remand on this motion for summary judgment, the only issue that remains is the full and fair opportunity to litigate in the Missouri action.

I read Judge Teilborg's opinion as affirming the prior summary judgment as to the other three elements of collateral estoppel, which are basically the same in Missouri [22] as anywhere else. And that is that you have to have the same issues, the same parties, in a judgment on the merits.

So the only issue before me then is the full and fair opportunity to litigate issue. This seems to be controlled by the Ninth Circuit's decision in *Daily,* which is in precisely the same factual circumstance — well, not precisely. It is in that the second action was a bankruptcy case where the issue is dischargability of the prior judgment. That's precisely the same context we have here.

The first action was somewhat different, and that was a default entered — judgment entered — on it as a discovery sanction. And the Ninth Circuit there held that collateral estoppel applied where the party had substantial participation in an adversary context in which it was afforded a reasonable opportunity to defend himself on the merits.

And that seems — since of course a default judgment was ultimately entered, which precludes any further defense, that seems to me to be saying you look at the full and fair opportunity to litigate not from the point at which a discovery sanction is entered, but you go back to the beginning. From the beginning of the litigation, did the party have a full and fair opportunity to participate?

If, because the party fails to participate properly in the discovery process, winds up getting a default judgment [23] against him, which is even more extreme than the discovery sanction imposed here, doesn't mean you can't find — pardon me for the double negative — a full and fair opportunity to litigate.

In other words, the Ninth Circuit seems to be saying, a full and fair opportunity to litigate can be found even when there has been a default judgment entered on account of a discovery sanction, because we looked as to whether before that the party was afforded a reasonable opportunity to defend himself on the merits.

But as persuasive as that is, I must be governed by Missouri law here. Missouri law has clearly established a four-factor test to answer the question of whether a party was given a full and fair opportunity to litigate, and those are the four factors identified in *Bi-State Development*.

Whether the person against whom estoppel is asserted had a strong incentive to litigate the first action — this was a claim for originally half a million dollars multiplied when you add in punitive damages that were requested.

I certainly fine and conclude that Mr. Muegler had as strong an incentive to litigate the first action as he does in this action. I think that standard — and all of them really — help a little bit when you consider the context in which — which these elements are intended to [24] address.

My view on collateral estoppel is always where you've got a plane crash, and somebody goes to small claims Court and gets a $100 judgment for their luggage that was destroyed. You can't use that as collateral estoppel to prove that the airline was negligent and get damages for the deaths that were caused.

That's what we're talking about here. Did the party have a strong incentive to litigate the first action? That's fully satisfied on these facts.

Let me skip over the second one for a moment, because I think that's what we're really arguing about — whether — the third one, whether the prior judgment may be inconsistent with one or more prior judgments. Mr. Muegler argues, well, it will be inconsistent with the first trial Court ruling, which was in his favor and got reversed. But since it was reversed, I don't think that counts as a prior judgment for factor number three. And since that was the only argument, I find and conclude that factor number three of the *Bi-State* four-factor test is satisfied here.

And the fourth one is whether the forum in the first action may have been substantially inconvenient to a party against whom estoppel is asserted. That's the same — intended to address the same scenario I already gave you the example of

where the plane crash occurs in New York, and [25] somebody goes to small claims Court up in Alaska, because their luggage didn't arrive. That may be an inconvenient forum.

Those aren't the facts here. Mr. Muegler was, I believe the undisputed facts are, then resident in Missouri and did not have any inconvenience in litigating and, in fact, actually participated in the trial and the pre-trial process without any apparent inconvenience. So I believe that's satisfied.

To some extent, it may overlap with the second one, which is if the first trial Court makes the process inconvenient by precluding discovery or participation at a trial, but I think that's properly addressed under factor number two, which I think is the real issue.

Whether the second forum may afford the party against whom estoppel is asserted procedural opportunities not available in the first action. Again, big picture. If for example, you have some rules in the first action that prevent discovery, prevent pre-trial motions, prevent parties from learning in advance of trail who the opposing party's witnesses are going to be — those kinds of procedural limitations may be sufficient to preclude application of collateral estoppel and that's what factor number two is intended to reach.

Here, on it's face, that doesn't apply, because we [26] are both dealing with basically the federal rules of civil procedure. The first action here was under the federal rules of civil procedure. This action is under the bankruptcy rules, but for all relevant purposes, I find and conclude that those

bankruptcy procedural rules provide the same procedural opportunities as do the federal rules. And in most relevant cases, they simply incorporate the relevant federal rule.

Moreover, I heard Mr. Muegler admit in oral argument today that if the same things occurred in my Court, I could impose the same sanction as could have the District Court. In other words, if he engaged in similar discovery abuse, the same sanction might be applicable here. And to me that is an admission that this Court does not provide any greater procedural opportunities than it did the District Court.

So I find on that alone, item number two, and therefore, all of the four factors of the *Bi-State* case, have been satisfied.

Nonetheless, I think what Mr. Muegler is really getting to is, in addition to the specific four factors, there is a penumbra, if you would, of the full and fair opportunity to litigate that permeates all of them.

And that is, even though the procedural rules are the same in both Courts, factor two may not be satisfied if [27] those procedural rules were applied in such a way in the first action as to deny a party a full and fair opportunity to litigate. And that is the essence of his argument. And I think I have to agree with him that Judge Teilborg has already decided that issue was not resolved by the Eighth Circuit's affirmance or by its denial of mandamus in the first action, because it's not the same issue.

On that point, we really do have some limited Missouri law that informs us. Mr. Muegler relies on the *Peoples Home*

Life case, which is very much on point in that there was — there were two actions. In the first one, there was a failure to abide by discovery resulting in effectively a judgment by a discovery sanction, which is then asserted as collateral estoppel in the second action.

And if you just go to the conclusion, you basically find the Missouri Court, which in this case is the Missouri Court of Appeals Western District, suggesting that the — because the first case was resolved on the basis of a discovery sanction, it did not satisfy the full and fair opportunity to litigate requirement.

Mr. Waltrip cites a bankruptcy decision, *Mironuck*, interestingly decided after *Peoples Home Life* case, and it does not discuss the *Peoples Home Life* case and yet reaches an opposite conclusion — finds that the prior case was sufficient for collateral estoppel even though the debtor [28] elected not to appear and defend. Without explanation, the debtor failed to appear at the State Court trial, and the matter proceeded in his absence, and the Court concluded collateral estoppel may nonetheless apply.

So my problem is, which of these two arguably relevant precedents governs the situation here. As to the *Peoples Home Life*, I have difficulty concluding that the apparent conclusion that the Court reached — that a discovery sanction judgment can never result in a full and fair opportunity to litigate — is really the essence of that holding or is binding here for a couple of reasons.

First of all, the party in the first case was the a guardian, and the Court's opinion indicates, I think rather clearly, that what it was seriously concerned about was the children that the guardian was supposed to be protecting. And in fact, they make pains to note that the guardian was removed from that position and a subsequent guardian appointed.

And I think very clearly, therefore, the Court did not want to hold the children in the second action to the consequences of what their defaultcating (phonetic) guardian did in a discovery sanction. So in a sense what they're saying there is that the discovery sanction imposed against the guardian will not be imputed to the children in the second action now being represented by a new and different [29] guardian.

It wasn't their conduct that resulted in the discovery sanction. It was their guardian's. But even more important than that, the Court of Appeals reversed, in the same case, the first judgment — held that the discovery sanction was not appropriate even in the first case.

Now unless there's some Missouri law I'm not aware of, to me that means you no longer have an issue for collateral estoppel argument purposes. The judgment's been reversed, and that makes the balance of the Court's discussion that collateral estoppel should or should not apply because the first judgment was by a discovery sanction victim. You don't any longer have a first judgment; it's been reversed. So how can you even have a collateral estoppel issue?

So I don't find the language — and it's there — in that opinion that you don't have a full and fair opportunity to litigate for collateral estoppel purposes when it's a default judgment arising from a discovery sanction to really be the holding of that case.

Looking at the *Mironuck* case then, in a sense, that's as much of a default judgment as we have here. The party did not appear, did not put on any evidence. No evidence or testimony was presented on behalf of the debtor, so the process, if you will, to adopt Mr. Muegler's [30] distinction was in the end result similar to what we have here — again adopting Mr. Muegler's argument that basically he wasn't allowed to put on any evidence.

Significant difference of course is that in *Mironuck*, it was pretty clearly that party's choice at the time of trial not to show up, whereas in our case, the reason there was no evidence presented on Mr. Muegler's behalf was because of a Court order resulting — or constituting — a discovery sanction.

The process was the same, and at least I must conclude that the finding and conclusion of a bankruptcy Judge sitting in Missouri is good evidence and the best I have before me of how Missouri law would apply the full and fair opportunity to litigate standard in the collateral estoppel context.

And I therefore conclude — again another double negative — that element is not satisfied simply because the party didn't, in fact, present evidence. In other words, it can be satisfied, even though there was no evidence presented

on behalf of the losing defendant in the first action, because that's what happened in *Mironuck*. No evidence was presented. That's also what happened here.

So then the only question to me is, well, is it different — does a different result come about because the reason why the party did not put on a defense was not simply [31] because he didn't show up, but rather because the Court said, "I prohibit you from calling any witnesses that you didn't identify in discovery, in your initial disclosures, on in a joint pre-trial, whatever the source of the discovery problem may be, and I won't let you testify because you asserted the Fifth Amendment in your deposition."

On that issue, I really don't find any Missouri law that applies. Again, I've already said that if you apply the most instructive Missouri law we have, which is the *Bi-State Development* case where they identify the four elements of full and fair opportunity to litigate, I think, by their terms — I do more than think, I find — each of those four elements were satisfied, in particular because viewed from the commencement of the trial until judgment there would be no more procedural opportunities available to Mr. Muegler here than there were in the first action.

So all we're dealing with is whether there's an additional penumbra beyond those four elements. In other words, I could I guess conclude, well, that Judge was an unfair Judge and improperly applied a discovery sanction, and although the rules are the same here, I wouldn't have come to that conclusion that precluded his full and fair opportunity to

litigate, that a second Court could really make that finding, judge the correctness, if you will, of the prior Judge's rulings.

[32] I'm not sure that's even permitted under Missouri law — to go behind, in a sense, what that Judge did if the overall procedure was fair. You had an opportunity to participate in discovery, to identify witnesses, to testify. Seems to me that's all *Bi-State Development* requires, but I go beyond that. And if there is a further penumbra that you can go behind the procedures employed in the prior case and second guess them and determine whether they are fair or not, I don't really find a Missouri case that says I have to do that. I'm inclined to think I don't have to do that, because I don't think it's proper to be having — and this is the whole reason we have the doctrine of collateral estoppel — is you don't relitigate issues that were properly decided, and it doesn't seem to me you should — in doing that — sort of import an element, well, was the prior action — did it reach the right result? We might as well throw out the idea of collateral estoppel altogether if the second Court is going to do that. Might as well retry the case and see if you see the same result as the prior Judge.

So I don't think I'm required to go behind the procedures that were in use in the prior action. But if I must, I think the answer to that is found in the Ninth Circuit's case in *Daily*, which in the absence of Missouri law, I believe the Erie doctrine is that I'll follow the law of the forum State.

[33] And here we have the Ninth Circuit upholding a grant of summary judgment on the ground of issue preclusion in an adversary proceeding regarding the dischargability of

a debt memorialized by a judgment entered in a prior case as a result of a discovery sanction.

And there the Court said this judgment was not an ordinary default judgment. The party deliberately precluded resolution of factual issues through normal adjudicative procedures by the discovery abuse, and in this case, that is what the Ninth Circuit upheld. That is what happened here.

And it seems to me that the Ninth Circuit, at least in *Daily* is saying it is not appropriate for the second Court to be going behind the first Judge's ruling and, in a sense, re-weigh was that an appropriate or inappropriate discovery sanction. I think the Ninth Circuit, no, we don't do that. And therefore, I find and conclude that all four elements of the full and fair opportunity to litigate prong of collateral estoppel, as applied in Missouri, exist here. And for those reasons, I grant the plaintiff's motion for summary judgment.

Mr. — those comments on the record constitute my findings of fact and conclusions of law. Mr. Waltrip, would you please lodge a form of order that simply recites for the reasons stated — for the findings of fact and conclusions of law stated on the record — its ordered granting plaintiff's motion for summary judgment. I'll sign that when it is [34] lodged.

MR. WALTRIP: Yes, Your Honor.

MR. MUEGLER: Judge, can you give me a cite to the *Daily* case?

THE COURT: 47 F.3d 365.

MR. MUEGLER: Thank you.

THE COURT: 47 F.3rd 36 (9th Cir. 1995).

MR. MUEGLER: Thank you.

THE COURT: All right, that concludes this hearing.

Thank you.

* * * *

Appendix C

UNITED STATES BANKRUPTCY COURT DISTRICT OF ARIZONA

No. 99-05531-PHX-RJH

Chapter 7

Adversary No. 99-0700

In re:

ARTHUR G. MUEGLER, JR.

Debtor

DAVID J. BENING and ALFRED W. HAARE,

Plaintiffs

v.

ARTHUR G. MUEGLER, JR.,

Defendant

ORDER GRANTING SUMMARY JUDGMENT

On this 26th day of March, 2002, came on to be heard Plaintiffs' Motion for Summary Judgment; filed herein on January 14, 2002, and the Court having considered the evidence and the argument of counsel and having announced findings of fact and conclusions of law on the record; and being of the opinion that the Motion should be granted;

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that Plaintiffs' claims against Debtor are hereby ruled non-dischargable pursuant to §§ 523(a)(2) and (6) of the Bankruptcy code.

DATED this 26th day of March, 2002.

s/ Randolph J. Haines
HONORABLE RANDOLPH J. HAINES
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED JULY 27, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV-00-1522-PHX-JAT

In the Matter of:

Arthur G. Muegler, Jr.,

Debtor,

Arthur G. Muegler, Jr.

Appellant,

vs.

David J. Bening et ano.

Appellees.

ORDER

Pending before this Court is an appeal of a grant of summary judgment in favor of Appellees. After reviewing the briefs of the parties and the applicable law, the Court has concluded that the decision of the Bankruptcy Court should be reversed.

Appendix D

I. STANDARD OF REVIEW

Rule 8013 of the Federal Rules of Bankruptcy Procedure states:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Thus, this Court will review the Bankruptcy Court's conclusions of law *de novo*, but will not reverse the Bankruptcy Court's findings of fact unless they are clearly erroneous. *See United States v. Olson*, 4 F.3d 562, 564 (8th Cir. 1993).

II. FACTUAL AND PROCEDURAL BACKGROUND

The relationship of the parties in the adversary case that is the subject of this appeal began in 1988. Arthur Muegler, Jr. (the debtor in the bankruptcy case and the Appellant herein) was acting as attorney for Concepts Communication. Appellant received payment for his legal services from Concepts Communication.[1] David Bening and Alfred Harre

1. The Court notes that Appellant received payment for only some of his outstanding fees. The total payment received was $21,937.50.

(the Plaintiffs in the adversary case and Appellees herein) invested in Concepts Communication. Appellees investment was unsuccessful. Additionally, the transactions of the Concepts Communication ultimately gave rise to a fraud prosecution of at least one of its principals.

Following the loss of their investment, Appellees sued Appellant in the federal district court of Missouri for fraud.[2] Appellees were successful before a jury and received a judgment in the amount of $130,000 compensatory damages and $150,000 punitive damages each, for a total judgment in the amount of $520,000. The case was appealed to the Eighth Circuit Court of Appeals. The Court of Appeals affirmed the judgments.

Appellant then filed for bankruptcy in Arizona. Appellees properly established their claim against Appellant in the adversary case. Appellant is now attempting to discharge the debt owed to Appellees through the bankruptcy proceeding. However, under 11 U.S.C. § 523, debts incurred by reason of fraud are not dischargeable in bankruptcy. Thus, the issue before the Bankruptcy Court was whether the debt owed to Appellees is dischargeable in bankruptcy.

Appellees filed a motion for summary judgment in the bankruptcy proceeding alleging that under the doctrine of collateral estoppel, Appellant is estopped from arguing that the debt they are owed was not procured by fraud and was, therefore, dischargeable. Appellee theory was that the issue

2. The case was a state law fraud case that was in federal court based on diversity jurisdiction.

of whether Appellant committed fraud was previously litigated in the state law fraud case. Further, Appellees allege, the elements proven in the state law fraud case were identical to the elements for non-dischargeability under 11 U.S.C. § 523. As result, Appellees contend, Appellant is collaterally estopped from re-litigating this issue.

The Bankruptcy Court agreed with Appellees and granted their motion for summary judgment. (Doc. #4A at 251, 255). Appellant timely appealed to this Court.

III. DISCUSSION

It is undisputed between the parties that the law where the original judgment was obtained shall control whether collateral estoppel will prevent a party from re-litigating an issue in another action. (Appellant's Opening Brief at 10, Appellee's Brief at 9). Under Missouri law, the Court considers four factors in determining whether collateral estoppel applies. "(1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; [and] (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit." *Harisfield v. Barkley*, 856 S.W.2d 342, 345 (Mo. Ct. App. 1993).

Appellant argues that neither factor 1 nor factor 4 are satisfied in this case. Therefore Appellant argues, collateral

estoppel should not apply and he should be given a new trial in the bankruptcy court.

A. IDENTICAL ISSUES IN PREVIOUS CASE

Appellant's argument is that the Bankruptcy Court committed error in concluding that the issues presented in Appellant's state law fraud case were identical in the issues presented in an analysis of whether a debt is dischargeable under 11 U.S.C. § 523.[3] Appellant's two contentions are that:

---

3. 11 U.S.C. § 523 provides:

(a) A discharge under . . . this title does not discharge an individual debtor from any debt — . . .

> (2) for money, property, services, or an extension renewal, or refinancing of credit to the extent obtained by —
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
> >
> > (B) use of a statement in writing —
> >
> > > (i) that is materially false;
> > >
> > > (ii) respecting the debtor's or an insider's financial condition;

(Cont'd)

1) 11 U.S.C. § 523 requires that Appellant "*obtain*" "money, property, services, or an extension, renewal, or refinancing of credit" and "obtain" was not an element of the state law fraud determination; and 2) that the culpability standard for punitive damages is a lesser standard than the culpability of which Appellant must be guilty for his debt to be non-dischargeable in bankruptcy.

Appellees respond that with respect to Appellant's first argument, "obtain" does not require that Appellant receive any benefit from his actions. Appellees cite *In re Pleasants*, 219 F.3d 372 (4th Cir. 2000) to support this position. Thus, Appellees allege, the fact that this element was not part of the previous state law fraud case does not prevent the issues from being identical. Appellees go on to argue that even if the issues are not identical, under Ninth Circuit law, the benefit received by Appellant need only be "attenuated." Appellees cite *In re Arm*, 87 F.3d 1046, 1048 (9th Cir. 1996) and *In re Ashley*, 903 F.2d 599, 604 (9th Cir. 1990) to support this position. Thus, Appellees argue, this Court can conclude as a matter of law that Appellant received a benefit because he received $21,937.50 in attorney's fees.

(Cont'd)

> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or crdit resonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive. . . .

With respect to Appellee's first argument, it is undisputed that the issue of whether Appellant obtained a benefit from his conduct was not presented to the jury in the original suit. Thus, this Court is asked to determine what the word "obtain" in 11 U.S.C. § 523 requires. When interpreting statutes, Courts are to give effect if possible to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Nonetheless, Appellants argue that obtain in this context does not add any additional requirement to the statute beyond the fraud elements proven in the original case. The Bankruptcy Court agrees with this analysis also citing *Pleasants.*

In *Pleasants*, the Fourth Circuit Court of Appeals held that "obtained" does not require that any portion of the creditor's claim in the adversary bankruptcy case actually is transferred to the debtor. 219 F.3d at 375. The *Pleasants* Court concluded that the fact the money was paid by the creditor to unrelated third parties as a result of the fraud committee by the debtor was sufficient for the debt to be non-dischargeable under 11 U.S.C. § 523. Appellees urge this Court to extend this analysis to conclude that the word obtain does not require that any additional element be proven in a case tried under 11 U.S.C. § 523.

In the Ninth Circuit, the Court of Appeals has outlined what must be found for a debt to be non-dischargeable under 11 U.S.C. § 523(a): 1) That a representation of fact was made by the debtor; 2) That the representation was material; 3) That the debtor knew the representation was false; 4) That the debtor made the representation with the intention of deceiving the creditor; 5) That the reliance of the creditor

was justified; and 6) That the damage proximately resulted. *See In re Arm*, 87 F.3d at 1049. The Court of Appeals went on to state that an indirect benefit to the debtor was sufficient to prevent a debt from being discharged. *Id.* However, the Court of Appeals did not add an element which required finding that the debtor receive *at least* an indirect benefit. Thus, the elements required to be proven in the Ninth Circuit to prevent a debt from being discharged do not include an element that the debtor "obtain" any benefit, even an indirect one.[4]

At pages 24-25 of Appellant's Opening Brief, Appellant lists the jury instructions given in the original suit. This Court finds that the instructions listed would require the jury to find each element required in the Ninth Circuit to prevent a debt from being discharged under 11 U.S.C. § 523. Thus, the Court finds that the issues were identical with respect to the compensatory damages.[5]

---

4. Some commentators in the bankruptcy area have stated that it would be unlikely that there would be an issue of whether the debtor received a benefit under 11 U.S.C. § 523 because it would be unlikely that someone would commit fraud without receiving any benefit from their actions. *See, e.g.*, 3 Norton Bankr. L. & Prac. 2d § 47:15. n.33.

5. Because the Court has found that the issues were identical, the Court need not reach Appellees second argument that this Court can take judicial notice of the fact that Appellant actually received a benefit because he was paid attorney's fees. However, the Court questions whether the Court could find that there were "identical issues" in the previous case if the Court musk take judicial notice of one of the elements.

Appellant's second argument addresses whether there were identical issues with respect to the award of punitive damages due to the different culpability standards Appellee's response to this argument is that by sending the issue of punitive damages to the jury the Missouri district court necessarily found Appellant's conduct to be intentional even though the jury only had to find recklessness to assess punitive damages. Further, Appellees argue, once the intentional fraud elements are established, under *Cohen v. de la Cruz*, 52 U.S. 213 (1998), all damages arising from that fraud are also non-dischargeable in bankruptcy.

Clearly under *Cohen*, punitive damages arising from fraudulent conduct will not be discharged in bankruptcy. *Id.* at 223. However, that is not the only inquiry in this case. The second inquiry in this case is whether there are identical issues in the award of punitive damages in the original case and the non-discharge of fraudulently obtained debts under 11 U.S.C. § 523 in this case.

While the Court finds that Appellant makes a compelling argument that the standard for an award of punitive damages in the original suit was not the same as the standard for a debt to be non-dischargeable under 11 U.S.C. § 523, punitive damages cannot be considered in a vacuum. Punitive damages will not be assessed if there is not liability on the underlying cause of action. Punitive damages only exist because of the finding of liability for the underlying action. *See In re Scarborough*, 171 F.3d 638, 644 (8th Cir. 1999). Additionally, this Court finds that the punitive damages in this case arise from the same conduct as the compensatory damages.

In the original suit, the jury assessed punitive damages after it found Appellant liable for fraud. This finding of liability on the underlying action was necessary before punitive damages could be assessed. This Court has already concluded that there were identical issues in the finding of liability in the compensatory damages phase of the original suit and in the standard for a debt to be non-dischargeable under 11 U.S.C. § 523 in this suit. Thus, the jury finding of culpability for the compensatory damages, a prerequisite to an assessment of punitive damages, results in the jury having necessarily found the elements for the compensatory damages award in the punitive damages award. Therefore, because identical issues exist for purposes of the compensatory damages award they also exist for the punitive damages award. As a result, the Bankruptcy Court did not err in finding that there were identical issues in the original suit.

B. FULL AND FAIR OPPORTUNITY TO LITIGATE

Under Missouri law, the Court considers four factors in determining whether a party previously had a full and fair opportunity to litigate an issue: "(1) whether the person opposing estoppel had a strong incentive to litigate in the first action; (2) whether the second forum may afford the party opposing estoppel procedural opportunities not available in the first action; (3) whether the judgment upon which estoppel rests does not comport with one or more prior judgments; and (4) [whether] the first action's forum may have substantially inconvenienced the party opposing estoppel." *Miller v. Pool and Canfield Inc.*, 800 S.W.2d 120, 126 (Mo. Ct. App. 1990).

Appellees make two arguments as to why this Court should find that Appellant had a full and fair opportunity to litigate the issue of whether he committed fraud, as defined by 11 U.S.C. § 523, in the prior state law case. The first argument is that on the record currently before this Court, the Court cannot determine whether Appellant had a full and fair opportunity to litigate. Thus, Appellants argue, the Court should conclude that Appellant has such an opportunity. The second argument is that all of Appellants contentions as to why he did not previously have a full and fair opportunity to litigate are themselves precluded from being argued in this Court by the doctrine of collateral estoppel. Appellees base this second argument on the theory that all of Appellant's contentions were previously argued to the Eighth Circuit Court of Appeals in the appeal from the previous judgment.

With respect to the first argument, the party asserting collateral estoppel bears the burden of proving it is appropriate. *See Jackson v. Sayad*, 741 S.W.2d 847, 851 (Mo. Ct. App. 1987); *Miller*, 800 S.W.2d at 124. Appellees agree that the burden is on them to prove that all of the elements of collateral estoppel have been met. (Doc. #4A at 158. Appellee Memorandum of Law in Support of their Motion for Summary Judgment on their Complaint for Determination that Debt is Non-Dischargeable – "Under the federal law of issues __ preclusion or collateral estoppel, the party asserting has the burden of proving the elements are met. *In Re Silva*, 190 B.R. 889, 892 (9th Cir. BAP 1995)."). Thus, because Appellees are asserting collateral estoppel, Appellees bear the burden of providing this Court with a record from which the Court can determine whether Appellant had a full and fair opportunity to litigate these issues in the previous action.

As a result, this Court will not apply collateral estoppel against Appellant merely because he failed to provide this Court with a suffice record.

Appellees second argument is that, even without the record, this Court can determine that Appellant had a full and fair opportunity to litigate. Appellees assert that all of the reasons that Appellant offers to show that he did not have a full and fair opportunity to litigate were argued by Appellant to the Eighth Circuit Court of Appeals in *Harre v. Muegler*, 113 F.3d 909 (8th Cir. 1997).

The Court has reviewed the decision of the Bankruptcy Court in this case which does not make any specific findings regarding Appellant's previous opportunity to litigate. The Court has also reviewed the Eighth Circuit Court of Appeals decision. As noted above, for Appellant to be collaterally estopped from arguing whether he had a full and fair opportunity to litigate, the issue presented to the Eighth Circuit Court of Appeals must be identical to the issues presented in this case. *See Hartsfield*, 856 S.W.2d at 345.

First, the Court notes that the Eighth Circuit Court of Appeals was reviewing the district court decision for abuse of discretion. *Harre*, 113 F.3d at 911. This standard of review is a more deferential standard than would be applied by the Bankruptcy Court reviewing whether Appellant had a full and fair opportunity to litigate in the previous matter. Identical issues do not exist when the burden of proof was higher in the original action than in the current action. RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982); *see also Housing Authority of St. Louis County v. Lovejoy*, 762 S.W.2d 843, 846 (Mo. Ct. App. 1988).

Second, while some of the arguments raised by Appellant are the same arguments that were raised to the Court of Appeals, the Court of Appeals was not considering the broader issue of whether Appellant was given a full and fair opportunity to litigate. This is evidenced by the fact that the Court of Appeals did not consider any of the four factors listed above which are to be considered when deciding whether a full and fair opportunity to litigate has been afforded. Accordingly, because the issue presented to the Court of Appeals and the standard of review applied by the Court of Appeals were not identical to the issue and standard of review considered in deciding whether there was a full and fair opportunity to litigate afforded in the collateral estoppel context, this Court holds that the doctrine of collateral estoppel does not preclude Appellant from arguing that he was not given a full and fair opportunity to litigate in the previous action.

As a result of the foregoing, this Court will not apply collateral estoppel to Appellant on the issue of whether had a full and fair opportunity to litigate. Though the basis for the Bankruptcy Court's decision that Appellant is subject to collateral estoppel on the dischargeability issue is unclear, to the extent that decision was based on collateral estoppel on the issue of full and fair opportunity to litigate, the decision is reversed. Additionally, as Appellees correctly note, this Court cannot determine whether Appellant was given a full and fair opportunity to litigate in the prior case on the record presented. Because the burden of proving collateral estoppel is on the party asserting it, and Appellees here have failed to meet that burden, this Court will not apply the doctrine of collateral estoppel to Appellant. As a result,

this case will be remanded to the Bankruptcy Court for further proceedings on the issue of whether Appellant's debt is dischargeable. Accordingly,

IT IS ORDERED that the decision of the Bankruptcy Court granting summary judgment to the Appellees is reversed;

IT IS FURTHER ORDERED that the Clerk of the Court shall remand this action to the Bankruptcy Court for further proceedings.

DATED this 26 day of July, 2001.

s/ James A. Teilborg
James A. Teilborg
United States District Judge

APPENDIX E — JUDGMENT AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DEFENDANT'S SEPARATE MOTIONS FOR SUMMARY JUDGMENT, AND PLAINTIFF'S MOTION FOR SANCTIONS OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA FILED AUGUST 2, 2000

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

Bankruptcy No. 99-05531 PHX RJH

Chapter 7

Adversary No. 99-00700

In Re:

ARTHUR G. MUEGLER, JR.

Debtor,

DAVID J. BENING,

and

ALFRED W. HARRE

Plaintiffs,

vs.

ARTHUR G. MUEGLER, JR.

Defendant.

Appendix E

JUDGMENT AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DEFENDANT'S SEPARATE MOTIONS FOR SUMMARY JUDGMENT, AND PLAINTIFF'S MOTION FOR SANCTIONS

This matter comes before this Court on Plaintiff's Motion For Summary Judgment, on the Separate two Motions For Partial Summary Judgment as filed with the Court by the Defendant/Debtor; and upon the Plaintiff's Motion For Sanctions.

The Court conducted its hearing on the Motions on July 24, 2000, and after having reviewed the entirety of the pleadings in this Adversary Proceeding, the Motions and Exhibits thereto, the cases cited by counsel for the Plaintiff's and the Debtor, Pro Se, and the arguments of counsel for Plaintiffs and the Defendant/Debtor, pro se the Court now grants Plaintiff's Motions For Summary Judgment.

The Court finds this Defendant to be collaterally estopped from discharging his debt to Plaintiff's based on the judgment entered against the Defendant in the U. S. District Court for the Eastern District of Missouri wherein judgment was entered in favor of Plaintiff David J. Bening, and against the Defendant/Debtor, in the amount of $130,000.00 for actual fraud and $130,000.00 as punitive damages and in favor of Plaintiff Alfred Harre, and against the Defendant/Debtor, in the amount of $130,000.00 for actual fraud and $130,000.00 as punitive damages and as further cited and set forth in the Plaintiffs' Motion For Summary Judgment.

The Defendant's Motions for Summary Judgment, denominated as Debtor's Motion for Partial Summary Judgment on Plaintiffs Complaint and Debtor's Motion for Summary Judgment #2 and Affidavit Exhibit/Legal Memorandum In Support Thereof are hereby denied.

Plaintiffs Motion for Sanction Against the Debtor Pursuant to Rule 9011 are denied, without prejudice.

Accordingly, it is the Order and Judgment of this Court that the Defendant/Debtor's debt to Plaintiffs in the amount of $520,000.00, and the interest accruing thereon, are non-dischargeable debts pursuant to 11 U.S.C. § 523(a)(2)(A). The Court further Orders and Adjudges that $260,000.00 of the original judgment amount which was awarded to the Plaintiffs as and for punitive damages are non-dischargeable pursuant to 11 U.S.C. § 523(a)(6).

SO ORDERED AND ADJUDGED THIS 2d DAY OF AUGUST, 2000.

s/ Randolph J. Haines
RANDOLPH J. HAINES, Judge Presiding
Judge of the United States Bankruptcy Court
for the District of Arizona

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 19, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-15259

D.C. No. CV-02-00632-JAT

ARTHUR G. MUEGLER, JR.,

Appellant,

v.

DAVID J. BENING; ALFRED W. HARRE,

Appellees.

ORDER

Before: LAY,* B. FLETCHER, and HAWKINS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Hawkins votes to deny the petition for rehearing en banc and Judge Lay and Judge Fletcher so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

---

* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

No. 05-629

In The
Supreme Court of the United States

ARTHUR G. MUEGLER, JR.,

Petitioner,

v.

DAVID BENING and ALFRED W. HARRE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Creditors hereby make the following corrections and amendments to Appellant's Statement of Facts pursuant to Supreme Court Rule 15.2. Petitioner Arthur Muegler Jr. is referred to as "Debtor" or "Defendant." Respondents David Bening and Alfred Harre are referred to as "Creditors" or "Plaintiffs." References to the Record on Appeal and the Appendix to the Petition for a Writ of Certiorari are preceded by an "*R.*" and an "*A.*" respectively.

Debtor met with and solicited investment funds from Creditors on behalf of Concepts as early as April of 1988. (*R.* 505, 523, 540-541, 543-544) Debtor's solicitations and representations continued throughout the duration of Creditors' relationship with Concepts. (*R.* 433-434, 443-445, 455, 458, 463, 469, 473, 496, 507, 512, 577) Debtor personally obtained from Creditors checks made out to Concepts as payment for their investment. (*R.* 414, 440, 450-451, 572, 573) Creditors handed the March 11, 1989 checks for $60,000 to Debtor personally. (*R.* 414, 567-573) Furthermore, Concepts paid Debtor for services rendered to the corporation. (*R.* 427, 428, 585, 587, 588, 621-622)

Debtor's obstruction and abuse of the Discovery process resulted in Rule 37 sanctions limiting the amount of evidence he could offer. Creditors filed, and the District Court granted, multiple Motions to Compel. (*R.* 733-806, 807-825) On June 3, 1992 the Debtor appeared for his Deposition and invoked the Fifth Amendment privilege against self-incrimination for every question other than his name. (*R.* 810-825)

Facing a trial date of April 4, 1994, Debtor filed a Verified Motion to Stay Trial on March 22, 1994. The

District Court denied said Motion that same day. (*R.* 826-827) Only then, 15 days before trial, did Debtor file his Supplemental Response to Plaintiffs' First Request for Production, Supplemental Response to Plaintiffs' First Interrogatories Directed to Debtor, and Rule 26(a)(1) Disclosure. (*R.* 828-852) In his April 7, 1994 affidavit the Debtor stated that until March 18, 1994 he did not have in his possession any documents Creditors had requested during discovery as the Prosecuting Attorney in Washington County, Illinois had them until that time. (*R.* 902-904) However, a copy of the Record Sheet for Debtor's criminal trial shows that on June 18, 1992 the State of Illinois returned to Debtor any documents they had taken as evidence. (*R.* 905) Debtor had the documents for 18 months before he disclosed his possession of them to the Creditors and before the date cited in his sworn statement to the District Court. (*R.* 999-1000, 1012)

On March 30, 1994 the Creditors filed several Motions seeking Rule 37 sanctions. (*R.* 908-957) On April 5, 1994 the United States District Court entered its Order striking Defendant's supplemental discovery responses and Defendant's Rule 26 disclosure; granting the Plaintiffs' Motion in Limine to prohibit the Debtor from using or discussing at trial any document listed in the responses; granting the Plaintiffs' Motion in Limine to prohibit the Debtor from calling as witnesses all person identified in the previous responses except David Bening, Alfred Harre, Bernice Harre and John Carnastiotis; and granting the Plaintiffs' Motion in Limine to prohibit the Debtor from testifying at trial. (*R.* 958-963) On June 13, 1994 the Court vacated its earlier Order striking the Defendant's Answer and Affirmative Defenses, but maintained the other sanctions. (*R.* 965)

The United States District Court for the District of Arizona did not find that Debtor did not obtain or receive any direct or indirect benefit from his fraud, but rather stated that the issue was not presented to the jury in the original suit. (*A.* 49a) The sole support for Debtor's claim that he had sought to "take care of" Creditors is his own affidavit, not Creditors' testimony or any specific finding of fact by a trial Court. (*R.* 284-285)

Debtor first argued that the jury instructions were ambiguous in his Reply Brief to the United States District Court for the District of Arizona, and none of the other pages Debtor cites in his Petition to this Court contain this particular argument. (*R.* 1061, 1072-1073, 1079-1081) The Court of Appeals for the Ninth Circuit found that the Court of Appeals for the Eighth Circuit has previously examined this issue and found the instructions at issue unambiguous. (*A.* 3a n.1)

ARGUMENT

I. 11 U.S.C. §523(a)(2)(A) Will Bar Discharge In Bankruptcy Of A Judgment Debt For Fraudulently Obtained Money Or Property Even If Debtor Does Not Receive A Benefit From His Fraud.

The basic policy underlying the Bankruptcy Code is that of providing relief to the "honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U.S. 213, 217, 118 S.Ct. 1212, 1216, 140 L.Ed.2d 341 (1998) (internal citations omitted). Given Debtor's role in the fraud underlying the judgment at issue and his conduct during the resulting

litigation, Debtor cannot portray himself as the aggrieved innocent.

Debtor argues that §523(a)(2)(A) prohibits the Bankruptcy Court from invoking the doctrine of collateral estoppel to bar discharge of his judgment debt unless the trial court in the underlying case found that Debtor received some benefit, however indirectly, from his fraudulent acts. In so arguing, Debtor misinterprets this Court's *Cohen* opinion and outright distorts subsequent appellate court opinions. While some circuits did indeed adopt a "receipt of benefits" test prior to this Court's decision in *Cohen v. de la Cruz*, 523 U.S. 213, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998), *Cohen* abrogated this test, as recognized by the Ninth Circuit Court of Appeals in the case below and the Courts of Appeals for both the Fourth and the Fifth Circuits in *In re Pleasants*, 219 F.3d 372 (4th Cir. 2000) and *In Matter of MM Winkler*, 239 F.3d 746 (5th Cir. 2001), respectively.

In *Winkler* innocent partners of a fraudulent debtor were held liable for their partner's actions. 239 F.3d at 748. They sought to discharge their debts in bankruptcy and the court examined whether §523(a)(2)(A)'s "obtained by" language required that they benefit from their partner's fraud as a predicate for barring discharge of said debts. *Id.* The court stated, "The language of the statute includes no 'receipt of the benefit' requirement . . . *Thus, the plain meaning of the statute is that debtors cannot discharge any debts that arise from fraud so long as they are liable to the creditor for the fraud.*" *Id.* at 749. (Emphasis added).

The Court then examined *Cohen*. The Fifth Circuit said that *Cohen* demonstrated that §523(a)(2)(A) exists to

protect victims of fraud, rather than debtors seeking to discharge their debts. *Id.* Therefore, despite Debtor's arguments to the contrary, the relevant inquiry is whether the debt in question arose from fraud, and not whether a debtor received any benefit from his or her fraudulent acts:

> "*Cohen* indicates that whether the debt arises from fraud is the only consideration material to nondischargeability. It also indicates that we should not read requirements like receipt of benefits into §523(a)(2)(A) and that the discharge exceptions protect fraud victims rather than debtors." *Id.* at 749.

The *Winkler* court also addressed any perceived inconsistency between *Winkler* and *Luce v. First Equip. Leasing Corp. (In re Luce)*, 960 F.2d 1277 (5th Cir. 1992). The Court stated that *Luce* did not require any receipt of benefits, and if it did, *Cohen* superseded such requirement. *Id.* at 749, 750. This interpretation of *Luce* is also squarely at odds with Debtor's analysis.

Creditors recognize that *Winkler* addressed innocent debtors vicariously liable for the debts of their partner, who did receive a benefit. However, the court did not rest its decision on any "receipt of benefits" test. Instead, the court focused simply on the debtors' liability for the fraud underlying the state court judgment. Creditors' interpretation, unlike Debtor's, has support in subsequent case law. A New York Bankruptcy Court, referencing the *Winkler* decision, stated, "The Fifth Circuit held that the benefit to a defendant is not a requirement to finding liability, particularly in an agency or partnership situation" refuting the notion of a "receipt of benefits" test. *In re Zaffron*, 202 B.R. 563, 569 (Bkrtcy. E.D.N.Y. 2004).

Debtor states that the Fourth Circuit's post *Cohen* holding in *In re Pleasants*, 219 F.3d 372 (4th Cir. 2000) supports his "receipt of benefits" theory. However, a careful reading of the case refutes Debtor's interpretation. In *Pleasants* the Court denied the discharge of all debts arising from a debtor's fraudulent conduct. *Id.* at 375. The Fourth Circuit does not, however, make any mention of the "receipt of benefits" test, nor does it endorse such a viewpoint. In fact, the Court reviews *Cohen* and states that it would bar discharge even in a case where "no portion of a creditor's claims was literally transferred to the fraudulent debtor." *Id.* No other Circuit Court of Appeals has adopted a "receipt of benefits" test under §523(a)(2)(A) since this Court's *Cohen* decision, and therefore there is no disagreement between the Circuits which would require this Court's intervention.

The United States Bankruptcy Court for the District of Colorado also issued a decision directly contradicting Debtor's analysis of *Cohen*'s effect on the "receipt of benefits" theory. In *In re Denbleyker*, 251 B.R. 891 (Bankr. Colo. 2000), the Court held that "once a plaintiff establishes the elements set forth in *Field v. Mans*, supra, i.e., that the debtor obtained money or property by fraud, any debt arising from the fraud is excepted from discharge." *Id.* at 898-899. In so holding the Court specifically rejected any "receipt of benefits" test, finding that *Cohen* had abrogated any such requirement. *Id.* at 899.

The *Denbleyker* court stated that a "receipt of benefits" test would conflict with the *Cohen* ruling in three ways. 251 B.R. at 896. First, it found that imposing a benefits test would conflict with the *Cohen* Court's refutation of the notion that §523(a)(2)(A)'s application could be limited by the words "obtained by," and that the true focus

of "obtained by" should be only on causation. *Id.* Second, the court found that the receipt of benefits test was inconsistent with the history of §523(a)(2)(A), stating that the statute historically had been used to stop debtors from discharging *all* liabilities arising from their fraudulent conduct. *Id.* at 897-898. (Emphasis added) Finally, the Court found that allowing a receipt of benefits test would frustrate the purpose of §523(a)(2)(A), which is protecting the interests of victims of fraud at the expense of the interests of fraudulent debtors who desire a new start. *Id.* at 898, (*citing Cohen*, 523 U.S. at 223, 118 S.Ct at 1219, *quoting Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 659-660, 112 L.Ed.2d 755 (1991).

Finally, Debtor misstates this Court's prior case law. As Creditors have already shown, there is considerable judicial opinion about *Cohen* which supports an interpretation which is the exact opposite of Debtor's. In *Cohen* the Court considered whether §523(a)(2)(A) would bar from discharge treble damages arising from a fraud judgment, or whether the statute would only bar discharge of the actual value of the "money, property, services, or credit" the debtor obtained via fraud. 523 U.S. at 215, 118 S.Ct at 1214-1215. The Court did not focus on the "receipt of benefits" theory, nor did it advance or approve of such a theory. Instead, the Court specifically held "that §523(a)(2)(A) prevents the discharge of *all* liability arising from fraud, and that an award of treble damages therefore falls within the scope of the exception" *Id.* at 215, 118 S.Ct at 1215 (emphasis added). As other courts have already noted, this Court also stated that the Bankruptcy Code seeks to protect only an "honest but unfortunate debtor," *Id.* at 217, 118 S.Ct. at 1216, *quoting*, *Grogan v. Garner*, 498 U.S. at 287, 111 S.Ct. at 659-660, and noted the

phrase "to the extent obtained by" found in §523(a)(2)(A) does not operate to limit the extent of how a debt arising from fraud may be barred from discharge. *Cohen v. De La Cruz*, 523 U.S. at 218, 118 S.Ct. at 1216.

Debtor also erred in his analysis of *Grogan v. Garner*. This case does not endorse the "receipt of benefits" theory, or address it in any way. The *Grogan* Court instead examined the requisite standard of proof necessary in a fraud trial to bar the resulting debt from discharge under §523(a), *Grogan*, 498 U.S. at 281, 111 S.Ct. at 656.

Finally, Creditors note that Debtor has not challenged the portion of the Appellate Court's decision affirming the District Court's affirmation of the Bankruptcy Court's decision to grant summary judgment and bar discharge of the debts at issue via §523(a)(6), and therefore he has waived any review of that portion of the Order below.

Because 11 U.S.C. §523(a)(2)(A) will bar discharge of a judgment debt for fraudulently obtained money or property even if debtor does not receive a benefit from his fraud, Creditors respectfully request that this Court deny Debtor's Petition for Certiorari Review.

III. Debtor Waived His Ambiguous Jury Instructions Argument By Failing To Timely Present It And The Jury Instructions At Issue Were Not Ambiguous And Complied With Missouri Law.

An examination of the Debtor's previous Memoranda and Briefs reveals that Debtor's argument contained in Point I of his Opening Brief to the Ninth Circuit Court of Appeals was not made in his Opening Brief to either the District Court or the Bankruptcy Court. For that reason,

the Ninth Circuit Court of Appeals correctly refused to consider this point. *Marx v. Loral Corporation*, 87 F.3d 1049, 1055 (9th Cir. 1996).

Under Ninth Circuit law, three circumstances warrant the consideration of Debtor's arguments for the first time on appeal – when review is necessary to prevent a miscarriage of justice, when the new issue arises while the appeal is pending as a result of a change in governing law, or when the issue is one of law and doesn't depend upon and further development of the record. *Id.* at 1055. In the present case, Debtor cannot seriously argue that there would be a miscarriage of justice. The Court of Appeals for the Eighth Circuit has already examined the jury instructions and found them proper. (*R.* 1013, 1026; *A.* 3a n.1) Debtor has cited no new case law which would justify his actions, and Creditors lacked the opportunity to request Debtor's file from his appeal to the Eighth Circuit, which would allow them to more fully develop the record on this case, as the file had been placed in storage and was not available for Creditor's filing deadline below.

Creditors note that Debtor has the temerity to represent to this Court that he made these arguments in a timely fashion, even going so far as to cite the record in support. However, there are no arguments regarding allegedly vague jury instructions to be found in the record prior to the date Debtor filed his Reply Brief with the District Court. The Ninth Circuit Court of Appeals was correct in finding Debtor has waived his opportunity to raise this argument.

Debtor's conduct in making this new argument at this point is consistent with his conduct throughout this litigation. He has once again flouted the rules in an